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JURISDICTIONAL STATEMENT

The appellant, Jared R. Derenzy, appeals from his conviction and ten-year sentence, as a "prior offender" (' 558.016.2, RSMo 2000), for delivery of a controlled substance near a school ('' 195.211, 195.214, RSMo Supp. 1998), which were imposed on August 23, 2000, by the Honorable Ellen S. Roper, Judge of Division No. 3 of the Circuit Court of Callaway County, Missouri, 13th Judicial Circuit, following a jury verdict returned on June 27, 2000 (L.F. 54-55; Tr. 296). The appellant's notice of appeal from this judgment was timely filed on August 31, 2000 (L.F. 56).

Jurisdiction of this appeal originally was vested in the Missouri Court of Appeals, Western District, pursuant to Art. V, ' 3 of the Constitution of Missouri. However, on December 11, 2001, following an opinion by the Court of Appeals, affirming the appellant's convictions and sentences, this Court sustained the appellant's application to transfer and ordered this case transferred from the Court of Appeals to this Court. Therefore, this Court now has jurisdiction of this appeal pursuant to Art. V, ' 10, of the Constitution of Missouri and Rule 83.03.

STATEMENT OF FACTS

A. Procedural History

On June 27, 2000, the appellant, Jared R. Derenzy, was found guilty of the delivery of a controlled substance near a school ('' 195.211, 195.214, RSMo Supp. 1998), following a jury trial in the Circuit Court of Callaway County, Missouri, 13th Judicial Circuit (Tr. 296). On August 23, 2000, he was sentenced, as a "prior offender" (' 558.016.2, RSMo 2000),[1] by the Honorable Ellen S. Roper, Judge of Division No. 3 of the Circuit Court, to a term of ten years' imprisonment (L.F. 54-55).

On August 31, 2000, the appellant timely filed his notice of appeal from this judgment (L.F. 56).

On December 11, 2001, a three-judge panel of the Missouri Court of Appeals, Western District, issued an opinion, affirming the appellant's convictions and sentences. ***State v. Derenzy***, No. WD58982 (Mo.App. W.D. 2001).[2]

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[1]The State alleged and proved that the appellant had a prior conviction for assault in the second degree (Tr. 5).

[2]A copy of the court's opinion has been attached to this brief as the

The appellant's alternative motion for rehearing or transfer was denied by the Court of Appeals on January 29, 2002, but on March 19, 2002, this Court sustained the appellant's application to transfer and ordered the case transferred to this Court pursuant to Rule 83.03.

B. Trial Evidence

In the spring of 1999, Richard Scott Ferrari was employed as an undercover narcotics investigator with the Missouri Highway Patrol (Tr. 150). Trooper Ferrari was part of an FBI drug task force called "Mustang" and was assigned to the Fulton area (Tr. 151-152). He wore civilian clothes, long hair and went by the name "Scott" (Tr. 151, 154).

In March of 1999, he met several times with Steve Myers, a Fulton police officer (Tr. 152-153). Myers introduced him to a confidential informant, Ryan O'Reilly, a Westminster College student who had agreed to furnish the Fulton Police Department with the names of Westminster students who were involved with drugs and other kinds of illegal activity (Tr. 213-218).

O'Reilly furnished the appellant's name to Officer Myers as a person he suspected was involved in drug activity, even though he had never personally observed the

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respondent's "Appendix A."

appellant selling or using drugs (Tr. 218). O'Reilly explained that someone--he could not remember who (Tr. 221)--had informed him that the appellant, who was a student at the university (Tr. 241), "was possibly involved in selling drugs" and that this was a "rumor around . . . campus" (Tr. 220). He relayed this information to Trooper Ferrari (Tr. 236). Trooper Ferrari asked O:REILLY to introduce him to some of the persons whose names he had given to Officer Myers, including the appellant (Tr. 222).

Trooper Ferrari began to "hang out" with O'Reilly in bars, at parties, and at the fraternity houses in Fulton (Tr. 153). His "cover story" was that he "was an out-of-city person [who] was employed" by O'Reilly's family, who owned O:REILLY Auto Parts (Tr. 153-154, 229).

On the evening of March 19, 1999, Trooper Ferrari accompanied O'Reilly to the Tap Room, a Fulton bar where college students frequented, to see if he could meet any individuals who were selling drugs in Fulton (Tr. 154). When he arrived at the bar, Trooper Ferrari joined O'Reilly and his friends in playing pool (Tr. 155, 227).

At some later point, O'Reilly introduced Trooper Ferrari to the appellant (Tr. 157). He introduced Trooper Ferrari to the appellant as "Scott," and told him he was "a friend from out of the area" (Tr. 158, 228). Sometime later, O'Reilly went up to the appellant and "asked him if there was anything that he could get for [his] friend" (Tr.

229). The appellant, possibly aware that he was "in a public place" where there were "other people around," was somewhat hesitant to respond, but he said "he might be able to help [him] out" (Tr. 229-230, 237).[3]

O'Reilly went back to Trooper Ferrari and, as a result of O'Reilly's conversation with the appellant, they went to the appellant's residence, located at 705 Holly Hock Lane in Fulton, a house that was located within 2,000 feet of Westminster College (Tr. 162, 210). They knocked on the door and were allowed inside by either the appellant or the other occupant of the house, whom Trooper Ferrari did not know (Tr. 165). At that time it was 1:12 a.m. (Tr. 168).

[3]O'Reilly testified that he asked the appellant the same question a second time while they were still in the bar, but did not recall the appellant's response (Tr. 231). However, he indicated that the appellant did not say "no" to either of his two requests (Tr. 237).

When Trooper Ferrari entered the home, he immediately detected the "very distinctive strong odor of burnt marijuana" (Tr. 165). Trooper Ferrari, who was carrying a concealed tape recorder, commented, "Nice smoke," or something of that nature (Tr. 165). The appellant then asked him if either he or O'Reilly had a lighter, because the appellant had a marijuana "blunt"[4] he wanted to smoke (Tr. 165).

Trooper Ferrari positioned himself between the appellant, who was sitting in a chair, and the other individual, who was sitting on the couch (Tr. 167). When they passed the marijuana "blunt" to him, he cupped his hands over the "blunt" and pretended to smoke it (Tr. 167). He engaged in "general conversation" with the appellant and his companion (Tr. 168).

Trooper Ferrari looked at his watch and asked the appellant what time the liquor stores stopped selling beer (Tr. 169). They told him that the liquor stores closed in ten minutes (Tr. 169-170). He then mentioned that his Aboy@--meaning O'Reilly--had told him that the appellant "could take care of us" (Tr. 170).

[4]A marijuana "blunt" is created by removing the tobacco from a cigar and replacing it with marijuana (Tr. 165, 246).

The appellant told him that he didn't have any marijuana for sale, but that he did have some for "personal use"--a narcotics term that referred to marijuana that a person kept for his own personal use (Tr. 193). The appellant asked him "how much [he] wanted" (Tr. 170). Trooper Ferrari said he was looking for approximately a quarter of an ounce (Tr. 170). "Play[ing] ignorant," he told the appellant he didn't know how much that would cost (Tr. 170).

The appellant then reached under the coffee table and retrieved a tray that contained a purple and gold Crown Royal bag (Tr. 170). The appellant reached inside the bag and pulled out a plastic bag of marijuana (Tr. 170). The appellant reached inside the bag and began breaking off pieces of marijuana, which he put into a plastic bag for the trooper (Tr. 170). Subsequent laboratory tests showed that the bag contained .626 grams of marijuana (Tr. 200).

Trooper Ferrari then began asking him if he could provide him with additional marijuana (Tr. 171). Trooper Ferrari asked the appellant how much he wanted for the marijuana, and the appellant answered $10 (Tr. 171). Trooper Ferrari tried to negotiate a cheaper price, telling the appellant that he knew people who would give him marijuana for free (Tr. 171). The appellant told him that this "was the best 10 sack or 10 bag of marijuana that [he] would see" (Tr. 171).

Trooper Ferrari asked the appellant if he could supply the officer with a larger amount of marijuana, and the appellant answered "yes" (Tr. 176). The trooper told him he was interested in purchasing a half an ounce of marijuana and asked him when he could get that for him (Tr. 176). The appellant told Trooper Ferrari to call him the next day, and gave the officer his telephone number, but the officer chose not to get back in touch with the appellant (Tr. 176, 182).

Nathan Anderson, a friend and former classmate of the appellant's at Westminster College, testified on behalf of the defense (Tr. 240-242). He told the jury that O'Reilly approached the appellant on several occasions at the Tap Room and asked the appellant if he could get some marijuana for his "friend from Pennsylvania," and that each time the appellant said "no" (Tr. 243-245).

He testified that he was at the appellant's house at around 1 a.m. when Trooper Ferrari and O'Reilly arrived (Tr. 246). He said that Trooper Ferrari was "real persistent" about asking the appellant for some marijuana (Tr. 247). According to Anderson, Trooper Ferrari pointed to a tray with a little bit of marijuana on it and kept asking, "How much for that? How much for that? Come on. How much for that?" (Tr. 247). While asking these questions, he would mention a dollar figure, either $5 or $10 (Tr. 248).

The appellant, Anderson said, responded by saying, "I don't have anything to sell. I don't want to sell anything to you" (Tr. 247). Trooper Ferrari ultimately "did get marijuana from" the appellant after giving him a $10 bill (Tr. 248, 251). Trooper Ferrari and O'Reilly then left (Tr. 249).

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE EVIDENCE, BECAUSE THE STATE WAS NOT REQUIRED TO PROVE THAT THE APPELLANT KNEW THAT THE HOME WHERE THE MARIJUANA WAS DISTRIBUTED WAS WITHIN 2,000 FEET OF A SCHOOL (WESTMINSTER COLLEGE). NEVERTHELESS, SINCE THE EVIDENCE SHOWED THAT THE APPELLANT WAS A STUDENT AT WESTMINSTER, IT COULD SCARCELY BE ARGUED THAT HE WAS UNAWARE OF THE SCHOOL'S PROXIMITY TO THE SCENE OF THE DELIVERY.

Under Point I of his substitute brief, the appellant argues that the evidence was insufficient to support his conviction of the delivery of a controlled substance within 2,000 feet of a school ('' 195.211, 195.214, RSMo 2000), because, he maintains, the State failed to prove beyond a reasonable doubt that the appellant *knew* that the unlawful distribution occurred "within two thousand feet" of a college or university (App.Sub.Br. 20-21).

However, despite what the appellant argues in his brief, and notwith- standing the Court of Appeals' erroneous opinion in ***State v. White***, 28 S.W.3d 391 (Mo.App. W.D. 2000), it has been settled since at least 1993 that a defendant is subject to the "penalty enhancement" provision of ' 195.214 even if he does not

have actual knowledge of the proximity of the school. ***State v. Wheeler***, 845 S.W.2d 678 (Mo.App. E.D. 1993). *See also* ***State v. Hatton***, 918 S.W.2d 790 (Mo. banc 1996) (holding that "penalty enhancement" provision contained in ' 195.218, RSMo 2000, regarding distribution of a controlled substance near public housing, does not require proof of the defendant's knowledge of the proximity of the housing units). Nevertheless, even if the statute could be construed to require such knowledge, it could scarcely be argued that the appellant did not know of the precise location of the school at issue, Westminster College, since he was a student at that college at the time of the offense.

In his substitute brief, the appellant goes through the motions of contesting this issue anyway, asserting that there was no evidence that the appellant had "any training or experience that would indicate that he could estimate a distance of 2[,]000 feet" (App.Sub.Br. 21). Nor, the appellant contends, "was he shown to have any direct knowledge of the distance" (App.Sub.Br. 21).

The absurdity of this argument constitutes a vivid illustration of precisely why the legislature did not make a defendant's knowledge of the distance an element of the offense: If such exacting proof were required, it would be virtually impossible to convict anyone under this statute,

unless the sale actually occurred on the grounds immediately outside a school or university.

The threshold question, of course, is whether the State, in order to utilize the "penalty enhancement" provisions of ' 195.214.1, was *required* to prove that the appellant had actual knowledge of the proximity of the school when he distributed a marijuana "blunt" and a plastic bag containing .626 grams of marijuana to an undercover officer. This question was definitively answered in ***Wheeler***, where the Eastern District of the Court of Appeals, interpreting the original version of ' 195.214.1, held that such knowledge was *not* required. The ***Wheeler*** rationale was reaffirmed in ***Hatton***, where this Court construed ' 195.218 as not requiring proof that the defendant knew that the distribution of controlled substances occurred within 1,000 yards of public or government-assisted housing.

The defendant in ***Wheeler*** was convicted under ' 195.214, RSMo Supp. 1989, which provided as follows:

> 1. A person commits the offense of distribution of a controlled substance near schools if such person violates Section 195.211 by unlawfully distributing or delivering any controlled substance to a person in or on, or within one thousand feet of, the real property comprising a public or private elementary or secondary

school, public vocational school, or a public or private junior college, college or university.

Wheeler, 845 S.W.2d at 680.

On direct appeal, Wheeler argued that the statute was unconstitutional because it applied "strict liability to a violation of a criminal statute without requiring proof of intent." ***Wheeler***, 845 S.W.2d at 680. In rejecting this argument, the Court of Appeals stressed that ' 195.214 was not a "strict liability" statute, even though it did not require actual knowledge by a defendant that a school was located within 1,000 feet of the place where the controlled substance was distributed:

> Section 195.214 is not a strict liability statute. It does not criminalize an otherwise innocent activity. It incorporates ' 195.211, RSMo (Cum.Supp.1991), which defines the offense of distribution of a controlled substance. A defendant must have violated ' 195.211 before consideration can be given to ' 195.214. Although neither statute prescribes a culpable mental state, a crime is committed under ' 195.211 if the defendant either knew that the substance he distributed, delivered or sold was a controlled substance or acted recklessly with regard thereto. *See* ' 562.021.2, RSMo (1986); *see also* MAI-CR3d 325.10, Notes on Use 4. Therefore, anyone who violates ' 195.211 knows that distribution of a

controlled substance is illegal, although the violator may not know that the distribution occurred within one thousand feet of a school. In the instant action, the verdict directing instruction submitted the mental state of knowingly as to the sale of cocaine, but did not require that the jury find that defendant have knowledge that he was within one thousand feet of a school.

Wheeler, 845 SW.2d at 680-681[5].

The Court of Appeals went on to emphasize that its conclusion was supported by the overwhelming weight of authority:

> The lack of knowledge requirement is further supported by federal and state court decisions which resolved similar issues. The federal cases dealt with 21 U.S.C.A. ' 845a, the statute which provided for penalty enhancement for drug dealing that occurred within one thousand feet of a school. In the face of a variety of constitutional challenges, federal courts have repeatedly interpreted the federal statute as not requiring that a defendant have specific knowledge of the proximity of a school. *See e.g., United States v. Haynes,* 881 F.2d 586, 590 (8th Cir. 1989); *United States v. Holland*, 810 F.2d 1215, 1223 (D.C.Cir.), *cert. denied*, 481 U.S. 1057, 107 S.Ct. 2199, 95 L.Ed.2d 854 (1987); *United States v. Falu*, 776 F.2d

46, 50 (2d Cir.1985). Similarly, state courts which have examined state counterparts to ' 195.214 have also upheld the lack of a knowledge requirement. *State v. Burch*, 545 So.2d 279, 281 (Fla.Dist.Ct.App. 1989); *State v. Moore*, 782 P.2d 497, 504-5 (Utah 1989); *State v. Morales*, 224 N.J.Super. 72, 539 A.2d 769, 775-776 (1987).

Wheeler, 845 S.W.2d at 681[6].

The Court of Appeals therefore concluded that, although ' 195.214.1 did *not* require knowledge of the proximity of a school, it was nevertheless constitutional:

> We therefore reject the contention that ' 195.214 is unconstitutional because it does not require that defendant have actual knowledge of the proximity of a school. *Although some buildings are not recognizable as schools from all points within a one thousand foot radius, the drug dealer bears the burden of ascertaining whether a school is located within the area of his operations*. *Falu*, 776 F.2d at 50.

Wheeler, 845 S.W.2d at 681[6] (emphasis added).

In ***Hatton***, this Court reached an identical conclusion in construing ' 195.218, which made it a class A felony for an individual to distribute or deliver a controlled substance in, on or within 1,000 feet of public or governmental-assisted housing. Citing, *inter alia*, ***United States v. Falu***, 776 F.2d 46 (2nd Cir. 1985), and ***United***

States v. Holland, 810 F.2d 1215 (D.C.Cir. 1987), *cert. denied*, 481 U.S. 1057, 107 S.Ct. 2199, 95 L.Ed.2d 854 (1987)--two of the cases cited by the Court of Appeals in ***Wheeler***--this Court unequivocally ruled that "[t]he due process clause simply does not require that the [S]tate prove [the] appellant's knowledge that the property is classified as public housing, before it will allow the [S]tate to enhance punishment for a crime [the] appellant intentionally committed." ***Hatton***, 918 S.W.2d at 794[6]. This Court emphasized that, under this statute, "[t]he burden of ascertaining those facts," *i.e.*, the proximity of the government housing to the place of distribution, "lies with the appellants under the statute." ***Hatton***, *id.*

Three years after ***Wheeler*** was decided and only months after the ***Hatton*** decision, the legislature amended ' 195.214.1 to provide that a person commits an offense under that statute if he or she distributes a controlled substance within *two thousand* feet of a school, and also added the language "or on any school bus." ' 195.214, RSMo Supp. 1996. But the legislature made no other changes to the statute, and, most significantly, did not see fit to add a requirement that the defendant have actual knowledge of the proximity of a school.

An appellate court will presume that the legislature, in re-enacting a statute in substantially the same terms, has approved and adopted the previous construction given to

the statute by a court of last resort, unless a contrary intent clearly appears from the statute. ***Investors Title Co. v. Chicago Title Ins. Co.***, 18 S.W.3d 70, 73[3] (Mo.App. E.D. 2000); ***U.S. Cent. Underwriters Agency, Inc. v. Manchester Life & Cas. Management Corp.***, 952 S.W.2d 719, 722[1] (Mo.App. E.D. 1997). The Court of Appeals is a "court of last resort." ***State ex. rel. Appel v. Hughes***, 351 Mo. 488, 173 S.W.2d 45, 50 (Mo. 1943); ***State ex. rel. Miles v. Ellison***, 269 Mo. 151, 190 S.W. 274 (banc 1916).[5]

In view of the ***Wheeler*** decision, the legislature's re-enactment of ' 195.214.1 in substantially the same language, and this Court's holding in ***Hatton***, construing a virtually identical statute, there can be little doubt that ' 195.214 does not require proof that the defendant knew of the existence of a school within 2,000 feet of the place

[5]Circuit courts and associate circuit courts are not, however, "courts of last resort." *See* ***State ex rel. Igoe v. Bradford***, 611 S.W.2d 343, 351[14] (Mo.App. W.D. 1980) (refusing to apply presumption to decision of the Cole County Circuit Court).

where the distribution of the controlled substances occurred. Indeed, in many cases, such knowledge would be difficult, if not impossible, to establish.

In this regard, ' 195.214 and ' 195.218 are little different from the statutes defining arson in the first degree and burglary in the first degree. Both the statutory provision defining first-degree arson (' 569.040.1, RSMo 2000) and the statute defining first-degree burglary (' 569.160.1(3), RSMo 2000) provide that the presence of a person inside (or, as in the case of first-degree arson, "present or in near proximity thereto"), is an aggravating factor or circumstance that elevates the crime to a class B felony. Yet, in either instance, the defendant's *knowledge* of the presence or "near proximity" of another person is *not* an element of the crime. ***State v. Bowles***, 754 S.W.2d 902, 906[1] (Mo.App. E.D. 1988) (first-degree arson); ***State v. Fetty***, 654 S.W.2d 150, 153[2] (Mo.App. W.D. 1983) (same); ***State v. Evans***, 755 S.W.2d 673, 676[3] (Mo.App. E.D. 1988) (first-degree burglary).

However, in ***White***, which was decided more than seven years after ***Wheeler***, and four years after ***Hatton***, the Court of Appeals held that the defendant's knowledge of the location of the school *was* an element of an offense under ' 195.214.1, and that, absent proof that the defendant knew the distribution had occurred within 2,000 feet of a

school, the case must be remanded for resentencing under ' 195.211, without resort to the "penalty enhancement" provisions of ' 195.214.1. ***White***, 28 S.W.3d 396-398[2-8].

Incredibly, ***White*** merely cited ***Hatton*** and ***Wheeler*** in passing (for the proposition that ' 195.211 was "not a strict liability statute") and did not even mention, much less discuss or distinguish, those holdings. Instead, ***White*** relied solely upon ' 562.021.3, RSMo Supp. 1999, and MAI-CR 3d 325.30 (10-1-98) to reach the conclusion that ' 195.214.1 requires proof that the defendant had actual knowledge of the presence of the school. But neither this statute nor the pattern instruction provides any actual support for the Court of Appeals' holding.

To be sure, ' 562.021.3 provides that "*if the definition of any offense* does not expressly provide a culpable mental state for any elements of the offense, a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly; but reckless or criminally negligent acts do not establish such culpable mental state" (emphasis supplied). However, in ***Wheeler***, the Court of Appeals construed an essentially identical provision, ' 562.021.2 RSMo 1986, and correctly concluded that the "knowledge" requirement contained therein applied only to the elements of the offense as outlined in ' 195.211, the statute defining the offense.

Accordingly, ***Wheeler*** held, the State was required to prove that the defendant knowingly distributed a controlled substance, and that he or she knew the nature of that substance. ***Wheeler***, 845 S.W.2d at 680[5]. But, since the presence of a school within certain proximity to the scene of the offense was not an "element" of an offense under ' 195.211, but rather merely an "enhancement provision," ***Hatton***, 918 S.W.2d at 794; ***State v. Crump***, 986 S.W.2d 180, 186 (Mo.App. E.D. 1999), it was not affected by the provisions of ' 562.021.2, which applies merely to statutes which provide "the definition of any offense." ***Wheeler***, 845 S.W.2d at 680[5].

At the time ***Hatton*** was decided, the legislature had amended ' 562.021 by deleting subsection 2 of the statute, thereby removing the statutory section that provided that "if the definition of an offense does not expressly prescribe a culpable mental state, a culpable mental state is nevertheless required." Nevertheless, this Court held that this amendment had no practical effect, in view of ' 562.021.1 and ' 562.026(2), RSMo 1994 (which indicated that a culpable mental state was required for each element of the offense unless that statute defining the offense indicated a purpose to dispense with such a requirement). Consequently, this Court held that ' 195.211 *did* contain a scienter element with respect to each of the elements of the offense, but that this element did not extend to the

"penalty enhancement" provision contained in 195.218. ***Hatton***, 918 S.W.2d at 794.

In ***White***, the Court of Appeals overlooked the ***Hatton*** and ***Wheeler*** holdings, as well as the fact that what is now ' 562.021.3 applies only to statutes which *define* a criminal offense, and not "penalty enhancement" provisions of the type contained in ' 195.214 and ' 195.218. This was, needless to say, a glaring error; fortunately, this case now affords this Court the opportunity to correct this mistake.

To be sure, as the Court of Appeals noted in ***White***, 28 S.W.2d at 396, MAI-CR 3d 325.30, the pattern jury instruction for an offense enhanced by ' 195.214, now requires the jury to find that the appellant knew that a school was located within 2,000 feet. In the oral argument before the Court of Appeals, the appellant's attorney argued that the instruction and the Notes on Use had somehow "overruled" ***Hatton*** and ***Wheeler***. However, pattern instructions cannot change the law, and are binding upon trial courts only to the extent that they follow, rather than conflict with, substantive law. ***State v. Carson***, 941 S.W.2d 518, 520[1] (Mo. banc 1997).[6] Where, as here, they

[6]As the Court of Appeals noted in ***White***, prior to the MAI-CR 3d revision, MAI-CR 3d 325.30 "did not require the defendant to know that the delivery took place within 1000 feet of a school." ***White***, 28 S.W.3d at 396 n. 2. The pattern

conflict with substantive law, they are not to be used or followed. ***Carson***, *id.*

Moreover, although the appellant's jury was required, pursuant to MAI-CR 3d 325.30 (Instruction No. 8), to find that the appellant "acted knowingly" with respect to the location of Westminster College (L.F. 28), this language was merely surplusage, and its inclusion in the verdict-directing instruction did not mean that the State was required to prove this nonessential fact or suffer the pain of reversal; the State is not required to prove extraneous facts simply because they are hypothesized in a verdict-directing instruction. ***State v. Neal***, 416 S.W.2d 120, 123[1-3] (Mo. 1967); ***State v. Condict***, 65 S.W.3d 6, 14-15[10] (Mo.App. S.D. 2001); ***State v. Lowery***, 565 S.W.2d

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instruction was modified in October of 1998 after the legislature amended ' 562.021 in 1998 to restore the "a culpable mental state is nonetheless required" language that had been deleted from the statute two years earlier. The MAI-CR Instructions Committee obviously overlooked the decisions in ***Hatton*** and ***Wheeler*** when it made the decision to modify MAI-CR 3d 325.30.

680, 683-684[1-2] (Mo.App. Spr.D. 1978); ***Ryan v. State***, 634 S.W.2d 529, 532[4] (Mo.App. W.D. 1982); ***State v. Scott***, 534 S.W.2d 537[4-8] (Mo.App. K.C.D. 1976). Where, as here, "a jury instruction in a criminal case . . . puts an additional burden on the [S]tate beyond what is legally required to establish guilt," reversal is not mandated if the evidence fails to establish this additional fact, because the instruction "is not prejudicial to the accused." ***Condict***, 65 S.W.2d at 14[10].

This case, then, provides this Court with the opportunity to overrule ***White***, and follow and apply ***Hatton*** and ***Wheeler***, which provide that, in utilizing the enhancement provisions of ' 195.214 and ' 195.218, the State is *not* required to prove that the defendant had actual knowledge of the proximity of a school or public housing unit.

Nevertheless, as emphasized at the outset of this point, in this case there *was* evidence from which the jury could reasonably have inferred that the appellant knew of the location of the school: The appellant was a student and football player at Westminster College, which was the school located within 2,000 feet of the site of the crime.

In ***White***, the Court of Appeals noted that the result would have been different if the State had been able to show that White "had ever seen the school, had ever traveled past the school, or had heard about the school's

location." ***White***, 28 S.W.2d at 397. In this case, by contrast, the evidence showed that the appellant had attended the school for some time, so he obviously was aware of its general proximity to the house where he smoked and delivered the marijuana. Despite what the appellant argues in his brief, the State certainly was under no obligation to show that the appellant actually measured the distance between the scene of the crime and the college he was attending, that he was a professional surveyor, or that he had actual knowledge of the exact distance between his house and the university he was attending.

In ***State v. Crooks***, 64 S.W.3d 887, 891 (Mo.App. S.D. 2002), the Court of Appeals, without expressly deciding whether it was necessary for the State to prove that the defendant knew that a school was located within 2,000 feet from the place of the drug sale, found that the jury could have inferred such knowledge from the fact that the appellant testified "he knew the school *might* be no more than five or six blocks from his house" (emphasis added), and the fact that a witness had seen school children walking past the defendant's house at lunch time.

In the present case, since the appellant was a student at the school in question (Westminster College) he obviously knew *precisely* how many blocks his house was from the school; unlike the defendant in ***Crooks***, he didn't have to guess or estimate. And, unlike the defendant in ***Crooks***,

he didn't have to rely on the presence of other students walking past his house to surmise that a school was nearby; he *was* one of those students.

It is, therefore, difficult to understand why the appellant takes the position that ***Crooks*** supports his argument; obviously, it does not, if only because the defendant in ***Crooks*** was not, and had never been, a student at the school in question.

Therefore, even assuming the State had the burden of showing that the appellant had actual knowledge of the proximity of the school to the scene of the crime, his status as a student at Westminster College supplied the required proof. However, for all of the reasons previously emphasized, the defendant's knowledge of the proximity of the school to the house where the marijuana was delivered was *not* an element of an offense under ' 195.211, as enhanced by the provisions of ' 195.214. To the extent that ***White*** and ***Crooks*** might be construed as holding or suggesting to the contrary, they should be overruled.

For all of these reasons, the trial court did not err in overruling the appellant's motion for judgment of acquittal at the close of the evidence. Point I of the appellant's substitute brief, in which he takes a contrary position, has no merit and entitles him to no relief.

II.

THE TRIAL COURT DID NOT ERR IN REFUSING THE APPELLANT'S PROPOSED INSTRUCTION NO. A, WHICH WOULD HAVE SUBMITTED THE OFFENSE OF POSSESSION OF 35 OUNCES OR LESS OF MARIJUANA AS A LESSER-INCLUDED OFFENSE OF DISTRIBUTION OF A CONTROLLED SUBSTANCE WITHIN 2,000 FEET OF A SCHOOL, BECAUSE (1) THE APPELLANT'S PROPOSED INSTRUCTION WAS INCORRECT, AND A TRIAL JUDGE DOES NOT ERR IN REFUSING AN INCORRECT INSTRUCTION ON A LESSER-INCLUDED OFFENSE; AND (2) SINCE THE APPELLANT ADMITTED DELIVERING THE MARIJUANA TO THE UNDERCOVER OFFICER, BUT RAISED THE DEFENSE OF ENTRAPMENT--WHICH, IF ACCEPTED BY THE JURY, CONSTITUTED A COMPLETE DEFENSE--THERE WAS NO BASIS FOR A JURY FINDING THAT THE APPELLANT WAS NOT GUILTY OF DELIVERING MARIJUANA BUT GUILTY OF MERE POSSESSION.

The appellant, under Point II of his brief, asserts that the trial judge erred "when [she] refused to instruct the jury concerning the lesser included offense of possession of marijuana as requested by" the defendant (App.Sub.Br. 23). The appellant goes on to assert, rather vaguely, that "[t]his instruction was supported by evidence that [the appellant] was guilty only of the lesser included offense" (App.Sub.Br. 23).

But what evidence? The appellant's point relied on fails to indicate precisely what evidence would have

supported the submission of this lesser offense. And he also fails to acknowledge that his actual argument at trial was that the trial judge had erred in failing to submit his proposed Instruction No. A, an instruction on entrapment that the appellant conceded, in the brief he filed in the Court of Appeals, was incorrect because it misidentified the underlying offense (App.Br. 12 n. 3).

The appellant's new argument--as divined from the argument portion of his substitute brief--is that although his proposed instruction was admittedly incorrect, the trial judge was obligated to submit a correct instruction, *sua sponte*, an argument that may not be considered on this appeal, because he did not advance it at trial or in his motion for new trial. And, he seems to be arguing that the "evidentiary basis" for his lesser-included offense was the possibility that the jury might have believed that he was not guilty of delivering marijuana because he was entrapped into doing so, but nevertheless believed that he was not entrapped into possessing the marijuana he admittedly delivered to the undercover officer.

There are at least three insuperable problems with this argument: First, the appellant is limited to the argument he raised at the instruction conference and in his motion for new trial: that the trial judge erred in refusing *his proposed instruction* on the lesser offense, an instruction that he now concedes was incorrect. At no

point in the court below did he argue, as he now attempts to do for the first time on this appeal, that the trial judge was required to give a correct instruction, *sua sponte*.

Second, even assuming the appellant had argued at trial or in his motion for new trial that the trial judge was required to submit a correct instruction on the lesser offense of mere possession, on her own initiative, this argument is a non-starter: The rule that the trial judge is required to submit a proper instruction on a particular subject, even if the defendant's proposed instruction is incorrect, applies only to instructions that a court is *required* to submit, even without a request, and not to non-mandatory instructions that the defendant must specifically request.

Third, even if the judge has an obligation to submit a correct instruction on a lesser-included offense when a defendant tenders an improper lesser-offense instruction, that obligation would not apply where, as here, there is no factual basis for the submission of such an instruction. Since the appellant admitted making the delivery and raised the defense of entrapment--which was a complete defense to the charged crime--he either was guilty of delivering a controlled substance within 2,000 feet of a school, or not guilty of anything. There was no middle ground.

A. The Appellant's Proposed "Instruction No. A" Was Incorrect and the Trial Court was Not Required to Submit a Correct One

The threshold issue presented by this appeal is whether the appellant may assert, for the first time on appeal, that the trial judge had an obligation to submit a correct instruction on the lesser-included offense of simple possession, when the appellant's tendered instruction was incorrect. The answer to this question is a resounding "no."

A trial judge is not obligated to submit an instruction on a lesser-included offense unless (1) there is a basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting him of the included offense, *and* (2) it is requested by one of the parties. ***State v. Fowler***, 938 S.W.2d 894, 898[6] (Mo. banc 1997); ' 556.046.2, RSMo 2000.

"If a defendant does not specifically request a lesser included instruction, the defendant may not complain about the trial court's failure to give the instruction." ***Fowler***, 938 S.W.2d at 898[7]. Accordingly, as the Court recently noted in ***State v. Robinson***, 44 S.W.3d 870, 872[6] (Mo.App. W.D. 2001), "[n]umerous cases hold that a trial court will not be convicted of error, plain or otherwise, in failing to give a lesser included offense instruction, *sua sponte*, where," as here, "it was not requested by defense counsel." *See* ***State v. Kobel***, 927 S.W.2d 455,

460[10] (Mo.App. W.D. 1996); ***State v. Geiler***, 866 S.W.2d 863, 864[2] (Mo.App. E.D. 1993); ***State v. Smith***, 686 S.W.2d 43, 45[2-3] (Mo.App. E.D. 1985); ***State v. Hall***, 789 S.W.2d 526, 527[1] (Mo.App. E.D. 1990); ***State v. Cole***, 753 S.W.2d 39, 41[2] (Mo.App., E.D. 1988); ***State v. Wickman***, 655 S.W.2d 749, 750 (Mo.App. S.D. 1983).

Here, the appellant did not specifically request that the judge submit an instruction on the lesser-included offense of possession of less than 35 grams of marijuana; rather, at the instruction conference he specifically asked the judge to submit his proposed "Instruction No. A" (Tr. 270-272). But this instruction was incorrect.

The appellant's proffered Instruction No. A began by stating, "If you do not find the defendant guilty of possession of more than five grams of marijuana with intent to deliver . . . " (L.F. 18). The appellant, obviously, was not charged with such an offense, nor was that crime submitted by Instruction No. 8, the verdict-directing instruction. Rather, Instruction No. 8 hypothesized that the appellant had delivered marijuana with 2,000 feet of a college (L.F. 28).

Apparently, the trial judge did not notice the error in the appellant's instruction. She refused to submit the appellant's proposed instruction, believing--possibly mistakenly--that the possession of less than 35 grams of marijuana can never be a lesser-included offense of the crime of distribution of a controlled substance within 2,000 feet of a school (Tr. 271-272).

In his motion for new trial, the appellant specifically asserted that the trial court had erred in refusing the appellant's "requested instruction of

possession of less than 35 grams of marijuana" (L.F. 34). The appellant even attached the tendered instruction to his motion (L.F. 34). The motion did not acknowledge that his proposed instruction was incorrect, or assert that, even if it was erroneous in some respect, the trial judge was required to submit a new or corrected version to the jury (L.F. 34).

Numerous cases hold that a trial judge cannot be convicted of error in refusing to submit an erroneous instruction. ***State v. Parkhurst***, 845 S.W.2d 31, 37[16] (Mo. banc 1992); ***State v. Kiser***, 959 S.W.2d 126, 130[4] (Mo.App. S.D. 1998); ***State v. Hope***, 935 S.W.2d 85, 86[1] (Mo.App. E.D. 1996). The court is not obligated to given an instruction which is not "meticulously correct." ***State v. Binnington***, 978 S.W.2d 774, 776[4] (Mo.App. E.D. 1998).

In his substitute brief, the appellant concedes that his proposed instruction was incorrect, but asserts that the error was not material and that, in any event, "[t]he court must instruct the jury on all issues raised by the evidence" (App.Sub.Br. 28).

This assertion is, however, overbroad and clearly inapplicable to the present case. To be sure, "*in some circumstances*," it has been held "that even though a requested instruction on an issue is defective, and is therefore properly rejected, the trial court is nonetheless under a duty to instruct on all of the law of the case and, consequently, is obligated to give a proper instruction on this issue" (emphasis added). ***State v. Garrette***, 699 S.W.2d 468, 510 (Mo.App. S.D. 1985). But, as the Court noted in ***State v. Gorman***, 940 S.W.2d 543, 546[1] (Mo.App. S.D. 1977), this rule is applicable only as to those instructions that the trial judge is required to submit when supported by the evidence, *even if not requested by the defendant or the prosecution*.

That rule does not, however, apply to certain instructions that need not be submitted unless requested by one of the parties, like converse instructions or instructions on lesser-included offenses. *See* ***Gorman***, *id.*

If the appellant wanted an instruction on a lesser-included offense, it was his obligation to either ask the court to submit one, or, if he proposed his own, to ensure that the instruction was in proper form. *See* ***Parkhurst***, 845 S.W.2d at 37[16]. Here, he merely submitted an incorrect instruction on a lesser-included offense that the trial judge was under no obligation to submit or correct. Although, as the appellant notes in his brief, the trial judge did not deny the instruction on the ground that it was in improper form, it is well settled that if the judge's ruling can be sustained on any basis, it is immaterial that the judge might have assigned an erroneous reason for the court's ruling. ***State v. Anderson***, 386 S.W.2d 225, 229[4] (Mo. banc 1963); ***State v. Haynes***, 482 S.W.2d 444, 448[4] (Mo.1972).

Moreover, even if the judge had been obligated to submit a correct instruction on a lesser-included offense, with or without a request, the appellant's motion for new trial failed to call this alleged "error" to the trial judge's attention, and therefore failed to preserve the issue for appellate review. ***Garrette***, 699 S.W.2d at 510[65-67].

Significantly, the appellant has not requested "plain error" review of this point under Rule 30.20, which might have been available if the appellant's only deficiency was his failure to preserve this issue in his motion for new trial. However, since a trial judge does not err in failing to submit an incorrect instruction on a lesser-included offense, and does not err in

failing to submit a correct instruction if he or she is not requested to do so, "plain error" review is simply unavailable to the appellant.

"It is a fundamental component of the plain error rule that relief is available only if error in the case be found." ***State v. Shubert***, 747 S.W.2d 165, 169[5] (Mo.App. W.D. 1998), *citing* ***State v. Garrett***, 518 S.W.2d 97, 99[1] (Mo.App. K.C.D. 1974). In this case, since the trial judge did not err in failing to either (1) submit the incorrect instruction, or (2) submit a corrected instruction, *sua sponte*, it necessarily follows that she cannot be convicted of "plain error."

B. There Was No Basis for an Instruction on the Lesser-Included Offense of Simple Possession, Because Entrapment Was a Complete Defense

However, even assuming the appellant's proposed instruction had been correct, or even assuming that the trial judge had some obligation to submit a corrected instruction, the appellant still would not be able to prevail on this point since there was no "factual basis" for the submission of an instruction on a lesser-included offense of simple possession. In this case, the appellant admitted delivering the marijuana to the undercover officer, but insisted that he had been entrapped into doing so. Although, as emphasized under Point IV, *infra*, of the State's brief, the appellant's evidence of entrapment was either negligible or completely nonexistent, to say the least, the trial judge submitted an instruction on entrapment to the jury, and the appellant defended on that basis.

In order to be entitled to an instruction on a lesser-included offense, even where properly requested, there must be a basis in the evidence for a

verdict acquitting the defendant of the offense charged and convicting him of the included offense. ***State v. Mease***, 842 S.W.2d 98, 112[27] (Mo. banc 1992), *cert. denied*, 508 U.S. 918, 113 S.Ct. 2363, 124 L.Ed.2d 269 (1993); ***State v. Smith***, 891 S.W.2d 461, 467[13] (Mo.App. W.D. 1994); ' 556.046.2.

In other words, ' 556.046.2 does not require an instruction on a lesser-included offense unless there is some affirmative evidence of a lack of an essential element of the higher offense which would not only have authorized acquittal of the greater crime, but would have supported a conviction of the lesser offense. ***State v. Olson***, 636 S.W.2d 318, 322[6] (Mo. banc 1982); ***State v. Arbuckle***, 816 S.W.2d 932, 935 (Mo.App. S.D. 1991). Consequently, an instruction on a lesser-included offense is required only if there exists evidence of probative value which could form a basis for an acquittal of the higher offense *and* a conviction of the lesser-included crime. ***Olson***, 836 S.W.2d at 321; ***State v. Dewey***, 869 S.W.2d 834, 837[5] (Mo.App. W.D. 1994); ***State v. Farley***, 863 S.W.2d 669, 671[2-3] (Mo.App. W.D. 1993).

In the present case, such evidence was obviously lacking. In the first place, as previously noted, the appellant's sole defense was entrapment, which is applicable only where, as here, the defendant admits his guilt to the underlying offense. ***State v. Sykes***, 478 S.W.2d 387, 390[3] (Mo. 1972); ***State v. Stock***, 463 S.W.2d 889, 892[1] (Mo. 1971); ***State v. Cain***, 905 S.W.2d 163, 164[3] (Mo.App. E.D. 1995); ***State v. Moore***, 904 S.W.2d 365, 368[1] (Mo.App. E.D. 1995); ***State v. Manns***, 745 S.W.2d 768, 775[6] (Mo.App. S.D. 1988); ***State v. Johnson***, 728 S.W.2d 675, 678[2] (Mo.App. S.D. 1987). Thus, the defense of entrapment is not available to an accused charged with an unlawful sale of narcotics who denies that he made the sale, because the

defense is premised on the basis that he did make the sale. ***Stock***, *id.*; ***Johnson***, *id.*; ***State v. Bounds***, 644 S.W.2d 652, 653[1] (Mo.App. E.D. 1982).

Here, the appellant's attorney, in his opening statement, admitted that the appellant had "transfer[red] about one-eighth ounce, six grams, of marijuana to Officer Ferrari" (Tr. 141), but that he "was entrapped into [this] delivery" (Tr. 148). Nathan Anderson, the appellant's sole witness, when asked if Officer Ferrari "did get marijuana from" the appellant, answered, "Yes" (Tr. 251). In closing argument, the appellant's attorney conceded, "Six grams of marijuana were delivered. $10 was exchanged" (Tr. 368).

The record, then, clearly shows that the appellant repeatedly acknowledged that the charged crime, delivery of a controlled substance within 2,000 feet of a school, had been committed, but that he was not guilty of any offense because he had been entrapped into doing so. Accordingly, if the jury found that the appellant was entrapped into committing the charged offense, he was not guilty of any offense, including any lesser-included crimes. On the other hand, if the appellant was not entrapped, he was guilty of the crime that his witness and his attorney admitted had been completed, delivery of a controlled substance.

It is well settled that, because entrapment is a "complete defense," a jury's acquittal on grounds of entrapment does not allow them to consider any lesser-included offenses, such as simple possession where, as here, the defendant is charged with selling or delivering controlled substances. ***United States v. James***, 257 F.3d 1173, 1183-1184 (10th Cir. 2001); ***United States v. Martinez***, 979 F.2d 1424, 1433[14] (10th Cir. 1992), *cert. denied*, 507 U.S. 1022, 113 S.Ct. 1824, 123 L.Ed.2d 454 (1993); ***United States v. Hill***,

973 F.2d 652 (8th Cir. 1992); ***People v. Henry***, 318 Ill.App.3d 83, 252 Ill.Dec. 355, 742 N.E.2d 893, 896 (2001); ***Garrick v. State***, 589 So.2d 760, 764 (Ala.Crim.App. 1991); ***State v. Monsoor***, 56 Wis. 2d 689, 203 N.W.2d 20, 23-24 (1973); ***State v. Jansen***, 198 Wis. 2d 765, 543 N.W.2d 552 (App. 1995); ***Moore v. State***, 471 N.E.2d 684, 687-688 (Ind. 1984). *See also* ***Farris v. Commonwealth***, 836 S.W.2d 451, 454 (Ky.App. 1992) ("the defense of entrapment constitutes an admission of the alleged conduct and thereby as to the principal offense extinguishes the theories of a lesser included offense"); ***People v. Humphries***, 257 Ill.App.3d 1034, 257 Ill.Dec. 407, 630 N.Ed.2d 104, 110 (1994) ("[A]ny request for a lesser-included offense instruction [on simple possession] would have been inconsistent with trial counsel's attempts to raise the defense of entrapment which required defendant to admit all the elements of the underlying offense").

In ***Martinez***, the defendant, who was convicted of the offense of possession with the intent to distribute, asserted that the trial judge erred in failing to give an instruction on simple possession as a lesser-included offense. ***Martinez***, 979 F.2d at 1433. However, since the defendant's sole defense was entrapment, the Court ruled that the defendant was not entitled to an instruction on the lesser-included offense:

> Because of his entrapment defense, [the defendant] essentially admitted the elements of the charged offense, seeking only to bar conviction on the grounds of invited conduct. We cannot, therefore, conclude a rational jury could have acquitted him on the charged offense and still have convicted him on simple possession.

> Because entrapment is a complete defense, *United States v. McLernon, 746 F.2d 1098, 1109-10 (6th Cir. 1984),* the jury's acquittal on the charged offense would not have permitted it to consider the lesser offense. Moreover, if the jury did not accept the entrapment defense, it was bound to convict on the charged offense in light of [the defendant]'s admissions.

Martinez, 979 F.2d at 1433[14].

In ***Hill***, the Court rejected a similar argument, although more succinctly. There, the Court held that since the defendant testified that he had distributed the controlled substances, as charged, and raised only the defense of entrapment, the record "provide[d] no basis for his claim of entitlement to a lesser-included-offense instruction." ***Hill***, 973 F.2d at 652.

In ***James***, the defendant argued that, although he willingly sold drugs to an undercover officer, he was entrapped into doing so in a school zone, and sought a lesser-included offense on the lesser-offense of mere sale of a controlled substance. The Court of Appeals, relying on ***Martinez***, rejected that argument, again emphasizing that, since entrapment is a complete defense, the jury was bound to either acquit the defendant of the offense charged or acquit him; there was simply no basis for the conviction of any lesser-included offense. ***James***, 257 F.3d at 1184.

In ***Henry***, an Illinois appellate court, in rejecting an argument identical to the one raised in the present case, stated:

> Defendant cites no precedent, and we are aware of none, in which a defendant is allowed to argue that he was entrapped into committing only certain elements of an offense. Entrapment is an all-

> or-nothing proposition. A defendant must choose either to raise the entrapment defense and admit to committing the charged offense or abandon the entrapment defense and seek the lesser-included-offense instruction. [Citation omitted.] That, too, is an all-or-nothing proposition. Defendant cannot have it both ways.

Henry, 742 N.E.2d at 896.

In ***Monsoor***, the Wisconsin Supreme Court held that the defendant was not entitled to an instruction on the lesser-included offense of mere possession in a case where he admitted selling marijuana; the Court emphasized that "[i]f the jury . . . believed entrapment had occurred, they were obligated to acquit defendant of the charged offense, not, as defendant suggests, convict him of the lesser offense." ***Monsoor***, 203 N.W.2d at 696.

In ***Moore***, the Indiana Supreme Court affirmed the trial judge's refusal to submit an instruction on mere possession, noting that, in order to justify the submission of a lesser-included offense, there must be some evidence supporting an acquittal of the greater crime and conviction of the lesser. But since, in a case involving the delivery of a controlled substance, the distinguishing element is delivery, so an admission that the drugs were delivered precludes any possible basis for a conviction of a lesser-included offense. ***Moore***, 471 N.E.2d at 687.

Although Missouri appellate courts have yet to consider this issue in the context of an entrapment defense, numerous cases hold that where the defendant's sole defense, if accepted by the jury, would provide a complete defense to the crime of the sale of a controlled substance, there is no basis for submitting instructions on the lesser-included offense of mere possession.

State v. Morton, 684 S.W.2d 601, 611[20] (Mo.App. S.D. 1985); ***State v. Corley***, 639 S.W.2d 94, 96[5] (Mo.App. E.D. 1982); ***State v. Ashley***, 616 S.W.2d 556, 560[8] (Mo.App. W.D. 1981); ***State v. Ingram***, 610 S.W.2d 395, 396[2] (Mo.App. S.D. 1980); ***State v. Arnall***, 603 S.W.2d 111, 112 (Mo.App. S.D. 1980);

In his brief, the appellant suggests that, since distribution necessarily requires either actual or constructive possession of the controlled substance during the process of delivery, the jury might have found that the appellant was entrapped into delivering it, but not possessing the marijuana he was charged with delivering (App.Sub.Br. 35-38). But, to the extent that an individual must possess a controlled substance in order to deliver it, this possession is necessarily subsumed into the delivery. Since entrapment is a complete defense to a charge of delivering, it is also a complete defense to any necessary components of that delivery, including any possession incidental in the delivery.

It is significant to note that the appellant fails to cite a single case where a Missouri appellate court has ever ruled that, in a prosecution for the sale, distribution or delivery of a controlled substance, the trial judge erred in failing to submit an instruction on simple possession. Nor has the respondent been able to locate such a case.

There would appear to be a simple reason for this dearth of case authority: Only in extremely rare situations would such an instruction appear to be warranted. The only situation that immediately springs to mind would be a case where the evidence shows that delivery of the controlled substance was attempted, but not completed. If, for instance, the delivery or sale was

interrupted by police or some other circumstance and the evidence was disputed on the issue as to whether the delivery was actually completed, an instruction on mere possession might be "supported by the evidence" and therefore required, if requested.

Otherwise, submitting an instruction on mere possession would necessarily be based upon the defendant's *prior* possession of the drug, and would subject the defendant to conviction based upon conduct with which he was not charged. That, obviously, would violate due process. ***State v. Smith***, 592 S.W.2d 165[3] (Mo. banc 1979). Here, the appellant was not charged with his *prior* possession of the marijuana he was alleged to have delivered to the undercover officer; the only possession necessarily included in the charge of delivering was the possession that was inherent in the act of delivering the marijuana to the officer.

However, as earlier emphasized, the appellant's defense of entrapment, if accepted by the jury, operated as a complete defense to the charge of delivery, *i.e.*, it encompassed each and every element of the offense, including any constituent elements that might constitute a lesser-included offense. ***Martinez***, 979 F.2d at 1433; ***Hill***, 973 F.2d at 653; ***Farris***, 836 S.W.2d at 454.

If the jury believed that the appellant had been entrapped into delivering the marijuana to Trooper Ferrari, it was required to acquit him, and there was no basis for a verdict convicting him of *anything*, including any lesser-included offenses. But if the jury believed that he was not entrapped, it was required to convict him of delivering the marijuana, and nothing else.

Consequently, even if the appellant had properly requested an instruction on the lesser-included offense of mere possession, or even if the appellant's proposed instruction had been correct, the trial judge would not have been required to submit such an instruction because the appellant's admission that the delivery had occurred, but that he was entrapped into doing so, absolutely precluded the submission of a lesser-included offense on the offense of possession of less than 35 grams of marijuana. That is to say, the appellant's use of the entrapment defense "constitute[d] an admission of the alleged conduct and thereby as to the principal offense extinguishe[d] the theories of a lesser included offense." ***Farris***, 836 S.W.2d at 454.

Point II of the appellant's brief, then, has no merit and entitles him to no relief.

III.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO GRANT A MISTRIAL WHEN AN UNDERCOVER OFFICER GAVE NON-RESPONSIVE TESTIMONY THAT HE "HAD KNOWN FROM PREVIOUS INTELLIGENCE THAT [THE APPELLANT] HAD SOLD NARCOTICS," BECAUSE THE TRIAL JUDGE PROMPTLY SUSTAINED THE APPELLANT'S OBJECTION AND INSTRUCTED THE JURY TO DISREGARD THIS TESTIMONY. IN ANY EVENT, THE APPELLANT SUBSEQUENTLY ESTABLISHED THAT THE SOURCE OF THE UNDERCOVER OFFICER'S INFORMATION WAS RYAN O'REILLY, AND WAS BASED SOLELY UPON RUMORS O'REILLY HAD HEARD AROUND CAMPUS, RUMORS THE APPELLANT'S ATTORNEY HAD ALREADY DISCUSSED IN HIS OPENING STATEMENT.

Under Point III of his substitute brief, the appellant contends that the trial judge abused her discretion in failing to grant a mistrial after the undercover officer, Richard Ferrari, testified that "[a]fter meeting [the appellant], [he] had known from previous intelligence that he had sold narcotics" (Tr. 158). Although the trial court promptly sustained the appellant's objection and instructed the jury to disregard the officer's unsolicited remark, the appellant argues that the jury most likely ignored the instruction, and that the remark was significant because it tended to negate the appellant's "entrapment" defense by demonstrating his alleged predisposition to distribute narcotics (App.Sub.Br. 40-50).

However, numerous cases hold that, in situations where a witness volunteers a nonresponsive remark of this nature, a mistrial is not generally warranted, and the offending remark may be cured by an instruction to disregard. This is particularly true in the present case, since the appellant's attorney mentioned in his opening statement that a police informant, Ryan O'Reilly, had provided the appellant's name to Fulton police as one of 25 or so "persons at Westminster College [who were] rumored to be involved in drug activity" (Tr. 142), and subsequently confirmed, through O'Reilly's trial testimony, that O'Reilly had furnished Trooper Ferrari with the "intelligence information" he was referring to in his nonresponsive remark (Tr. 218). Under these circumstances, Trooper Ferrari's statement could not have been prejudicial, since it was merely corroborative of, and cumulative to, information the appellant had already presented to the jury through defense counsel's opening statement and through O'Reilly's subsequent testimony.

If this were the typical case, this issue could be resolved simply by citing the legal principles relating to nonresponsive remarks of this type. Unfortunately, it is not unusual for witnesses to unexpectedly volunteer inadmissible statements. ***State v. Ralls***, 918 S.W.2d 936, 940[8] (Mo.App. W.D. 1996); ***State v. Silas***, 885 S.W.2d 716, 720 (Mo.App. W.D. 1994); ***State v. Brasher***, 867 S.W.2d

565, 569[8] (Mo.App. W.D. 1993). If and when such an incident occurs at trial, the action called for rests within the trial court's sound discretion. ***Ralls***, *id.*; ***Silas***, *id.*; ***Brasher***, 867 S.W.2d at 569[5]. The trial court, after all, is in the best position to determine the effect of the remark and what remedial measures, if any, might be necessary to cure that effect. ***Brasher***, 867 S.W.2d at 569[7].

The declaration of a mistrial is a drastic remedy that is to be employed only in the most extraordinary circumstances. ***Silas***, 885 S.W.2d at 720[2]; ***Brasher***, 867 S.W.2d at 569[6]. A court's refusal to declare a mistrial based upon a witness's unexpected statement will be reversed on appeal only where that refusal constitutes an impermissible abuse of its discretion. ***Silas***, *id.*; ***Brasher***, 867 S.W.2d at 569[5].

Nonresponsive, voluntary testimony that indicates an accused was involved in offenses other than the one for which he is on trial does not mandate a mistrial. ***State v. Bringleson***, 905 S.W.2d 882, 888[12] (Mo.App. S.D. 1995); ***State v. Miller***, 680 S.W.2d 253, 255[5] (Mo.App. E.D. 1984). In determining whether the trial court abused its discretion in refusing to declare a mistrial, the court considers the following factors: (1) whether the statement was, in fact, voluntary and unresponsive [to the prosecutor's questioning if the prosecutor asked the

question], or whether the prosecution "deliberately attempted to elicit" the comment; (2) whether the statement was singular and isolated, or whether it was emphasized or magnified by the prosecution; (3) whether the remark was vague and indefinite, or whether it 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 it; 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. Witte***, 37 S.W.3d 378, 383[7] (Mo.App. S.D. 2001); ***State v. Immekus***, 28 S.W.2d 421, 431[24] (Mo.App. S.D. 2000); ***State v. Bowles***, 23 S.W.2d 775, 781[13] (Mo.App. W.D. 2000).

Here, the prosecution did not "deliberately elicit" the comment; in fact, it was totally nonresponsive to the prosecution's question ("What was that discussion" (Tr. 158)), an inquiry that was designed solely to elicit the nature of a discussion between Trooper Ferrari and O'Reilly (Tr. 158).

The witness's statement was singular and isolated, and was not subsequently mentioned by the prosecution. It also was "vague and indefinite," since it did not contain any details or specifics regarding the appellant's activities. The court immediately sustained the appellant's objection

to the remark and ordered the jury to disregard the witness's remark (Tr. 160). The court even ordered the comment stricken (Tr. 160).

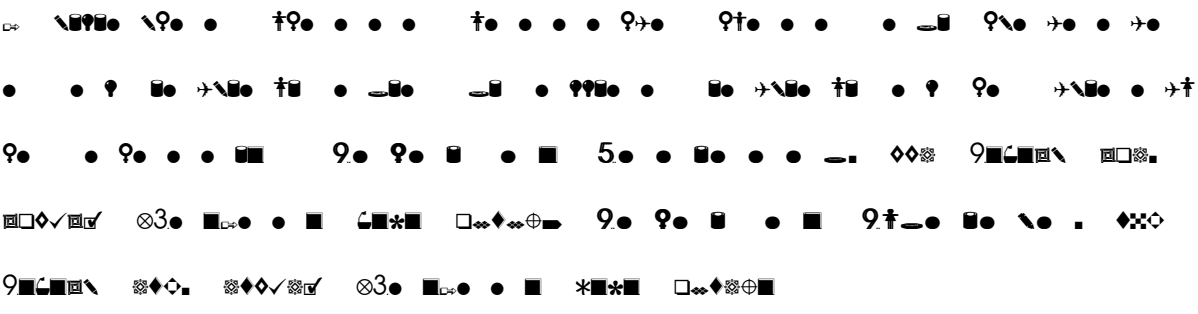
Finally, the remark could not have had a "decisive effect" on the jury's verdict, if only because the undercover officer taped the transaction so that the jury could hear for itself that the appellant's attempted "entrapment" was completely bogus. The audiotape reveals no pleading or importuning by Trooper Ferrari or reluctance on the appellant's part to sell .626 grams of marijuana to the undercover officer.

In any event, this is not the typical case where evidence of a defendant's bad acts accidentally slips into evidence, because, in this particular instance, the appellant was able to completely neutralize any prejudicial effect by demonstrating to the jury the unreliable nature of the information. The appellant's attorney acknowledged, during his opening statement, that the appellant had been targeted by Trooper Ferrari because the officer had heard a rumor that the appellant was involved in drug activities at Westminster College (Tr. 142). The appellant then called O'Reilly as a defense witness; O'Reilly acknowledged that he had been the source of Trooper Ferrari's information that the appellant had been involved in narcotics sales, even though O'Reilly actually had never seen the appellant use, transfer or sell marijuana or have

any involvement in drug activity of any type (Tr. 218). O'Reilly confirmed that he had given Trooper Ferrari the appellant's name based solely upon an unsubstantiated rumor he had heard (Tr. 218).

Consequently, the appellant was able to establish, as his attorney informed the jury in his opening statement, that the source of Trooper Ferrari's supposed information was uncorroborated hearsay furnished to him by O'Reilly.

A defendant suffers neither prejudice nor reversible error where evidence is improperly admitted if the evidence properly before the court establishes essentially the same facts, ***State v. Bucklew***, 973 S.W.2d 83, 93[25] (Mo. banc 1998), *cert. denied*, 525 U.S. 1082, 119 S.Ct. 826, 142 L.Ed.2d 683 (1998), or if the improper evidence is "simply cumulative of . . . substantial other evidence" which comes in without objection. ***State v. Nastasio***, 957 S.W.2d 454, 459[3] (Mo.App. W.D. 1997). This is particularly true where it is cumulative to evidence presented by the defense:



Furthermore, although the appellant was successful in emphasizing, during defense counsel's opening statement and

during O'Reilly's direct examination, that Trooper Ferrari did not possess any verifiable information that the appellant had previously *sold* marijuana, even the appellant's evidence indicated that the appellant and a friend, Nathan Anderson, had previously smoked marijuana together (Tr. 250), and the fact that the appellant had a supply of marijuana on hand to smoke and to deliver to Trooper Ferrari certainly indicated that he was no stranger to the drug.

Moreover, shortly before the appellant distributed the .626 grams of marijuana to Trooper Ferrari for $10, he passed him a marijuana "blunt" to smoke, which was, itself, a violation of '' 195.211, 195.214 RSMo 2000. In this regard, it is significant to note that the appellant was charged in this case under '' 195.211, 195.214, which only required the State to prove that the appellant had "distribut[ed] or deliver[ed]" a controlled substance, which can be established merely by proof that a person passed a marijuana cigarette or some other controlled substance to another person; it is not necessary to prove that the distribution or delivery was for remuneration. *See* ' 195.005(8), (12), RSMo 2000 (defining terms "deliver" and "distribute").

It is, therefore, readily apparent that Trooper Ferrari's brief, nonresponsive remark was not so egregious that it could not be cured by an instruction to disregard.

Generally, any prejudice inherent in volunteered testimony regarding bad acts committed by an accused "may be removed by striking the improper testimony and instructing the jury to disregard it," ***State v. Sanders***, 903 S.W.2d 234, 238[6] (Mo.App. E.D. 1995), since a jury is presumed to follow a court's oral instruction to disregard improper, nonresponsive testimony. ***Brasher***, 867 S.W.2d at 569[9].

In this case, it is readily apparent that the trial judge cured any error by promptly sustaining the appellant's objection and instructing the jury to disregard the trooper's volunteered remark. The drastic remedy of a mistrial was clearly not required. Point III of the appellant's brief is without merit and entitles him to no relief.

IV.

THE TRIAL COURT DID NOT ERR IN OVERRULING THE APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL, DESPITE THE APPELLANT'S CLAIM THAT THE "UNDISPUTED EVIDENCE" INDICATED THAT HE HAD BEEN ENTRAPPED INTO DISTRIBUTING THE MARIJUANA TO THE UNDERCOVER OFFICER, SINCE THERE WAS, IN FACT, NO SUBSTANTIAL EVIDENCE FROM EITHER THE STATE OR THE APPELLANT THAT THE APPELLANT HAD BEEN ENTRAPPED.

Under Point IV of his brief, the appellant again raises the "entrapment" issue, this time claiming that the "uncontroverted evidence" showed that he "repeatedly refused to sell the marijuana until his will was overborne by" the undercover officer, Richard Ferrari (App.Sub.Br. 51-55).

However, as emphasized under Point II of the State's brief, this was a case where the appellant's evidence of entrapment was so insignificant and insubstantial that it is questionable that he was even entitled to an instruction on this defense (although the trial judge, perhaps out of an overabundance of caution, gave the jury an instruction on entrapment). Although the appellant's attorney maintained to the jury that his client was entrapped into selling Trooper Ferrari a $10 bag of marijuana, the appellant's evidence showed at worst, this sale occurred following repeated requests by Trooper Ferrari and his

informant, Richard O'Reilly, simple requests that were unaccompanied by any indicia of actual entrapment, *i.e.*, persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship.

A defendant does not make out a *prima facie* case of entrapment merely by showing that he had to be asked more than once before agreeing to commit the prohibited conduct. Nevertheless, even assuming the appellant's evidence was sufficient to warrant an instruction on entrapment, the State's case was devoid of any evidence of entrapment and, in any event, contained substantial evidence of the appellant's predisposition to sell marijuana.

Furthermore, it is at least arguable that the appellant, albeit unwittingly, effectively waived or withdrew any "entrapment" defense he might have had when he successfully objected to proposed testimony from the State that the appellant, in 1997, was "involved with marijuana" and ran from a vehicle which had been stopped by police, and which, at the time of the stop, contained "the odor of marijuana" (Tr. 258). Since a defendant's prior involvement with narcotics tends to show his predisposition to possess or sell such controlled substances, the appellant's successful preclusion of the State's introduction of such "predisposition" evidence necessarily

resulted in the waiver or withdrawal of any entrapment claim he might otherwise have had.

The defense of entrapment has been codified in ' 562.066, RSMo 2000, and provides, in pertinent part, as follows:

> 1. The commission of acts which would otherwise constitute an offense is not criminal if the actor engaged in the prescribed conduct because he was entrapped by a law enforcement officer or a person acting in cooperation with such an officer.
>
> 2. An "entrapment" is perpetrated if a law enforcement officer or a person acting in cooperation with such 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 was not ready and willing to engage in such conduct.
>
> * * *
>
> 4. The defendant shall have the burden of injecting the issue of entrapment.

This statute "requires proof of *both* inducement to engage in unlawful conduct *and* an absence of a willingness to engage in such conduct." ***State v. Willis***, 662 S.W.2d 252, 255[2] (Mo. banc 1983) (court's emphasis). *See also* ***State v. Wells***, 731 S.W.2d 250, 251[2-3] (Mo. banc 1987). It is the defendant's initial burden to go forward with

substantial evidence showing both unlawful governmental inducement and his own lack of predisposition. ***Willis***, 662 S.W.2d at 255[2]; ***State v. Moore***, 904 S.W.2d 365, 368[4] (Mo.App. E.D. 1995); ***State v. Mitchell***, 897 S.W.2d 187, 191-192[9] (Mo.App. S.D. 1995); ***State v. McFerron***, 890 S.W.2d 764, 768[13] (Mo.App. E.D. 1995); ***State v. Adams***, 839 S.W.2d 740, 743[2] (Mo.App. W.D. 1992). The State then has the burden of proving lack of entrapment by rebutting either the defendant's evidence of inducement or by showing his predisposition. ***Willis***, *id.*; ***Mitchell***, 897 S.W.2d at 192[9]; ***Adams***, 839 S.W.2d at 743[3].

If the defendant has injected the issue of entrapment into the case and the State's evidence contains no evidence of entrapment, the State will have met its burden of disproving entrapment, and entrapment will not be established as a matter of law. ***Willis***, 662 S.W.2d at 257[3]; ***Mitchell***, 897 S.W.2d at 192[11]; ***Adams***, 839 S.W.2d at 743[5]. The fact finder is free to reject the defendant's evidence and conclude he was not unlawfully entrapped. ***Willis***, *id.*; ***Mitchell***, *id.*; ***Adams***, *id.*

In the present case, however, there was no *substantial* evidence *from either the State or the defense* indicating that the appellant was unlawfully entrapped. The State's evidence showed that the appellant was approached by a police informant, Ryan O'Reilly, in a Fulton bar, who "asked him if there was anything that he could get for

[his] friend," Richard Ferrari (Tr. 229). The appellant, possibly aware that he was "in a public place" where there were "other people around," was somewhat hesitant to respond, but told O'Reilly that "he might be able to help [him] out" (Tr. 229-230, 237). O'Reilly asked the appellant the same question a second time while they were still in the bar, but did not recall the appellant's response (Tr. 231). However, he indicated that the appellant did not say "no" to either of his two requests (Tr. 237).

When O'Reilly and Trooper Ferrari arrived at the appellant's house, the inside reeked of the smell of burnt marijuana (Tr. 165). Trooper Ferrari, who was carrying a concealed tape recorder, commented, "Nice smoke," or something of that nature (Tr. 165). The appellant then asked him if either he or O'Reilly had a lighter, because the appellant had a marijuana "blunt" he wanted to smoke (Tr. 165).

Trooper Ferrari positioned himself between the appellant, who was sitting in a chair and the other individual, who was sitting on the couch (Tr. 167). When they passed the marijuana "blunt" to him, he cupped his hands over the "blunt" and pretended to smoke it (Tr. 167). He engaged in "general conversation" with the appellant and his companion (Tr. 168).

Trooper Ferrari looked at his watch and asked the appellant what time the liquor stores stopped selling beer (Tr. 169). They told him that the liquor stores closed in ten minutes (Tr. 169-170). He then mentioned that his Aboy@--meaning O'Reilly--had told him that the appellant "could take care of us" (Tr. 170).

The appellant told him that he didn't have any for sale, but that he did have some for "personal use"--a narcotics term that referred to marijuana that a person kept for his own personal use (Tr. 193). The appellant asked him "how much [he] wanted" (Tr. 170). Trooper Ferrari said he was looking for approximately a quarter of an ounce (Tr. 170). "Play[ing] ignorant," he said he didn't know how much that would cost (Tr. 170).

The appellant then reached under the coffee table and retrieved a tray that contained a purple and gold Crown Royal bag (Tr. 170). The appellant reached inside the bag and pulled out a plastic bag of marijuana (Tr. 170). The appellant reached inside the bag and began breaking off pieces of marijuana, which he put into a plastic bag for the trooper (Tr. 170). Subsequent laboratory tests showed that the bag contained .626 grams of marijuana (Tr. 200).

Trooper Ferrari then began asking him if he could provide him with additional marijuana (Tr. 171). Trooper Ferrari asked the appellant how much he wanted for the marijuana, and the appellant answered $10 (Tr. 171).

Trooper Ferrari tried to negotiate a cheaper price, telling the appellant that he knew people who would give him marijuana for free (Tr. 171). The appellant told him that this "was the best 10 sack or 10 bag of marijuana that [he] would see" (Tr. 171).

Trooper Ferrari asked the appellant if he could supply the officer with a larger amount of marijuana, and the appellant answered "yes" (Tr. 176). The trooper told him he was interested in purchasing a half an ounce of marijuana and asked him when he could get that for him (Tr. 176). The appellant told Trooper Ferrari to call him the next day, and gave the officer his telephone number, but the officer chose not to get back in touch with the appellant (Tr. 176, 182).

Despite what the appellant argues in his brief, this evidence, *i.e.*, the State's evidence, contains no hint of entrapment. For one thing, although the appellant asserts that he was entrapped into delivering the marijuana to Trooper Ferrari, he scrupulously ignores the fact that the undisputed evidence showed that the appellant had previously delivered marijuana to the officer by passing him the marijuana "blunt." Thus, by the time the sale occurred, the appellant had already committed the same crime--delivering a controlled substance within 2,000 feet of a school--when he passed the marijuana "blunt" to the

trooper. And the appellant does not argue that he was entrapped into committing this offense.

In any event, it is apparent from the record that the appellant could not have been entrapped into selling the marijuana to the undercover officer, since there was no evidence of either an inducement or the appellant's lack of predisposition.

"Inducement" in this context means any "governmental conduct which creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense." ***United States v. Ortiz***, 804 F.2d 1161, 1165[11] (10th Cir. 1986). Mere solicitation by a law enforcement agent does not raise the issue of entrapment, ***Ortiz***, 804 F.2d at 1165[12]; ***State v. Wilson***, 615 S.W.2d 571, 573[3] (Mo.App. W.D. 1981); ***State v. Disandro***, 574 S.W.2d 934, 936[6] (Mo.App. St.L.D. 1978), and this is true even if "the government agent initiated the contact with the defendant or proposed the crime." ***Ortiz***, *id.* Rather, there must be some evidence of an improper "inducement," such as persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship. ***United States v. Garza-Juarez***, 992 F.2d 896, 909[22] (9th Cir. 1993); ***United States v. Mendoza-Salgado***, 964 F.2d 993, 1004[12] (10th Cir. 1992); ***Ortiz***, 804 F.2d at 1165[11-12].

Here, *the State's evidence* with respect to the sale merely showed that first the informant, and later the undercover officer, asked the appellant to sell him some marijuana and the appellant readily acquiesced. This is not entrapment. Indeed, the appellant's "`ready commission of the criminal act amply demonstrate[d] the [appell]ant's predisposition.'" ***Mendoza-Salgado***, 964 F.2d at 1004.

Remarkably, although the main thrust of the appellant's argument at trial was that he had been entrapped, he did not testify at trial, and Nathan Anderson, the only witness he called who indicated that the appellant was reluctant to make the sale, merely testified that the appellant had to be asked several times to sell the undercover officer the marijuana. But Anderson did not testify that either O'Reilly or the trooper threatened, persuaded or "cajoled or wheedled" the appellant "into making the sale" to the undercover officer. ***State v. Jay***, 724 S.W.2d 293, 300[4] (Mo.App. S.D. 1987), *quoted* in ***State v. Manns***, 745 S.W.2d 768, 772[2] (Mo.App. S.D. 1988).

As earlier noted, the appellant's entrapment defense hinged on the testimony of a single witness. Anderson, a friend and former classmate of the appellant's at Westminster College, testified that O'Reilly had approached the appellant on several occasions at the bar and asked the appellant if he could get some marijuana for his "friend

from Pennsylvania," and that each time the appellant said "no" (Tr. 243-245).

Anderson went on to testify that he was at the appellant's house at around 1 a.m. when Trooper Ferrari and O'Reilly arrived (Tr. 246). He said that Trooper Ferrari was "real persistent" about asking the appellant for some marijuana (Tr. 247). According to Anderson, Trooper Ferrari pointed to a tray with a little bit of marijuana on it and kept asking, "How much for that? How much for that? Come on. How much for that?" (Tr. 247). Anderson maintained that while asking these questions, Trooper Ferrari would mention a dollar figure, either $5 or $10 (Tr. 248).

The appellant, Anderson said, responded by saying, "I don't have anything to sell. I don't want to sell anything to you" (Tr. 247). But, according to Anderson, the appellant soon changed his mind and agreed to sell the appellant $10 worth of marijuana (Tr. 248-249).

Although his testimony--if believed[7]--contained some minimal evidence of the appellant's purported reluctance to

[7]Anderson's testimony was categorically refuted, in all material respects, by State's Exhibit 3A, a tape-recording of the entire incident that occurred at the appellant's house. It conclusively showed that the appellant *never* said "no" when the officer asked him to sell him some marijuana.

make the sale, it contained no evidence of "inducement" beyond a series of simple requests, unaccompanied by any persuasion, fraudulent representations, threats, coercive tactics, harassment, promises of reward, or pleas based on need, sympathy or friendship. *See* ***Garza-Juarez***, 992 F.2d at 909[22]; ***Mendoza-Salgado***, 964 F.2d at 1004[12]; ***Ortiz***, 804 F.2d at 1165[11-12]. Even Anderson's testimony, in other words, contains no evidence that the State "tempted [the] appellant to make a sale he would not otherwise have made from his stock of drugs to any other customer who appeared with proper recommendation." ***State v. King***, 708 S.W.2d 364, 368 (Mo.App. W.D. 1986). There was, as earlier noted, no evidence that the appellant "had to be cajoled or wheedled into making the sale." ***Jay***, 724 S.W.2d at 300[4].

Moreover, the record is replete with evidence showing the appellant's predisposition to distribute the marijuana. The appellant already had the marijuana on hand, and, from the odor in his house, it was clear that he already had been smoking some even before Trooper Ferrari and O'Reilly arrived at the house. Shortly after they entered the house, he "delivered" the marijuana to Trooper Ferrari by offering him a marijuana "blunt." The appellant, even according to his own witness, had previously smoked marijuana, appeared familiar with narcotics terminology, boasted about the quality of the marijuana he furnished

Trooper Ferrari, and readily agreed to sell him larger quantities of the drug (Tr. 165-176).

Acts and statements which reveal an individual's propensity for engaging in certain illegal activities, *i.e.*, his predisposition, refute a post-arrest claim of entrapment. ***Moore***, 904 S.W.2d at 369[11]. Evidence of a defendant's prior use, possession or sale of drugs, or ability to supply drugs on request, is evidence of a predisposition to sell drugs sufficient to negate a defense of entrapment. ***Mitchell***, 897 S.W.2d at 192[10]; ***Adams***, 839 S.W.2d at 743[6].

In this case, as in ***Adams***, the evidence was replete with evidence of the appellant's disposition, including the appellant's prior use and distribution of marijuana, and his willingness to procure more of the drug for the undercover officer, whom he had met only that evening.

There was, in other words, no substantial evidence of entrapment in this case, from any source. In fact, Anderson, the witness who claimed that the appellant was initially reluctant to sell marijuana to the undercover officer--a claim that was refuted by a tape-recording of the conversation--did not actually testify that the appellant was "entrapped" into making the sale, since his testimony merely showed that the appellant, after initially saying "no" to Trooper Ferrari, agreed to sell him some

marijuana merely because he did not take the appellant's initial "no" for an answer.

Finally, even if the there had been any evidence in the case that might otherwise have raised an issue of entrapment, the appellant ultimately waived the defense by successfully objecting to the State's attempt to introduce additional evidence of the appellant's predisposition to distribute the marijuana. As earlier emphasized, the State sought to introduce evidence which would have established that, in 1997, the appellant was "involved with marijuana" and ran from a vehicle which had been stopped by police (Tr. 258). This vehicle, at the time of the stop, contained "the odor of marijuana" (Tr. 258).

Since a defendant's prior involvement with narcotics tends to show his predisposition to possess or sell such controlled substances, ***Mitchell***, 897 S.W.2d at 192[10]; ***Adams***, 839 S.W.2d at 743[6], the appellant's successful effort to prevent the State's introduction of such "predisposition" evidence necessarily resulted in the waiver or withdrawal of any entrapment claim he might otherwise have had. Obviously, a defendant cannot complain on appeal that the State failed to introduce evidence of his predisposition to commit the charged offense when, as a result of his objection, evidence of his predisposition was excluded by the trial judge.

This final argument is, however, academic for purposes of this appeal. Since there was no *substantial* evidence of entrapment in this case--from any source--the appellant cannot credibly argue that the "undisputed evidence" showed that he was entrapped as a matter of law. Point IV of the appellant's brief has no more merit than his first three arguments, and must be overruled.

CONCLUSION

For the reasons presented under Points I through IV, *supra*, of the State's substitute brief, the appellant's conviction and ten-year sentence, as a "prior offender" (' 558.016.2, RSMo 2000), for delivery of a controlled substance near a school ('' 195.211, 195.214, RSMo 2000) should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief (a) includes the information required by Rule 55.03, and (b) complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 14,720 words, excluding the cover, this certification, the signature block and the appendices, as determined by WordPerfect 6.1 software; and

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

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 24th day of May, 2002, to:

Ms. Elizabeth Unger Carlyle
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_____
Philip M. Koppe