IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC95280
	)	
NATHAN JENSEN,	)	
	)	
Appellant.	)	

APPEAL TO THE
MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF PULASKI COUNTY, MISSOURI
25TH JUDICIAL CIRCUIT
THE HONORABLE D. GREGORY WARREN, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Nathan Jensen, appeals his convictions for second degree murder, Section 565.021,[1] armed criminal action, Section 571.015, and abandonment of a corpse, Section 194.425, following a jury trial in Pulaski County, Missouri. The Honorable D. Gregory Warren sentenced Nathan to a term of life imprisonment, a concurrent five year term of imprisonment and a consecutive four year term of imprisonment, respectively (LF 118-119).[2]

Jurisdiction of this appeal originally was in the Missouri Court of Appeals, Southern District. Article V, section 3, Mo. Const.; section 477.060. This Court thereafter granted the State's application for transfer, so this Court has jurisdiction. Article V, sections 3 and 10, Mo. Const. and Rule 83.04.

[1] All statutory references are to RSMO 2000, unless otherwise noted.

[2] The record on appeal consists of pretrial and trial transcripts (TR), a sentencing transcript (Sent. TR), a legal file (LF), and exhibits (EX).

STATEMENT OF FACTS

The State charged Chris Jorgensen and Nathan Jensen (Appellant) with first degree murder, armed criminal action and abandonment of a corpse, in the death of Kenny Stout, in Ava, Missouri (LF 23-25; TR 304). Stout died from multiple stab wounds resulting in blood loss; the evidence also showed that he had been severely beaten, which could have contributed to his death (TR 923-924). The undisputed evidence also showed that, afterwards, Jorgensen attempted to kill Nathan to silence him about Stout's death (TR 404-411).

The main issues that Nathan's jury had to decide were what role, if any, Nathan played in Stout's death, and what level of culpability should be attributed to him. The evidence at trial was as follows:

Kenny Stout and Shon Gossett were friends (TR 217). Stout stayed with Gossett while he visited Ava in December, 2011 (TR 217). Gossett was still in school, but Stout had dropped out (TR 192, 218). Gossett and Stout hung out at a public outdoor basketball court (TR 218).

Jorgensen, his teenaged stepson, Patrick, and Nathan also frequented this park to play basketball (TR 219, 314). Nathan had been staying at Jorgensen's house for a few weeks (TR 306, 310). Gossett and Stout were at the park a couple of times when Jorgensen and the others were playing (TR 314). Jorgensen said that Nathan asked him to come with him to the park a couple of times because he was worried about getting jumped by Gossett and Stout (TR 316). Jorgensen, who is a "super tall," "big guy" went along to make sure Nathan "didn't get his butt whooped" (TR 259, 317, 773).

At some point, Stout and Gossett got into a texting "war" with Nathan (TR 219). Gossett testified that Nathan was "messing with my 16-year-old cousin" (TR 219). Defense counsel objected to this testimony as a "prior bad act," and the trial court sustained the objection (TR 219). Later in Gossett's testimony, the prosecutor asked Gossett if he knew how old [Nathan] was, and Gossett replied, "I knew he was too old to be with my 16-year-old cousin" (TR 232). Defense counsel again objected and asked for a mistrial (TR 232). The prosecutor apologized, stating, "I should have maybe talked to him" (TR 232). The trial court denied the request for mistrial, and instructed the jury to disregard, "the last sentence that he made" (TR 233). However, the last sentence made by Gossett was "I don't know" (TR 233).

During this "texting war," Gossett and Stout also called Nathan, who was with Jorgensen; they were acting like they were big and tough (TR 221, 270). According to Gossett, there were threats of fighting in the future (TR 221, 229-230). Angry messaging went back and forth, and they called each other names (TR 229). Jorgensen testified that he was angry with Gossett and Stout because they had threatened to rape and kill his wife (TR 437, 761). He also testified that they had sent a picture of a penis to his wife (TR 437).[3] At the end of the conversation with Gossett and Stout, Jorgensen threatened them by saying, "I will find you and it's going to be bad when I do." (TR 436, 438).

[3] Jorgensen's wife, Alicia, and Nathan had identical phones (TR 315); it is possible that Alicia answered Nathan's phone by mistake when Gossett and Stout were making these calls and sending these texts (TR 473).

December 13, 2011

A couple of weeks after this phone exchange, Gossett and Stout were trying to sell some K2 – synthetic marijuana – that they had obtained from one of Gossett's roommates (TR 225). Gossett later admitted that they had contacted Nathan to try and rip him off on a drug deal (TR 269, 759). The following texts were sent from Stout's phone to Nathan's phone on December 13:

- 3:11 - "Do you want to buy some U2?"
- 3:11 - "K2"
- 3:13 – "Do you want to?" (Nathan appears to not want any (TR 759)).
- 3:14 – "know anybody that does? We've got a lot."
- 3:16 – (Nathan asks who is texting him) "Kenny and Shon."
- 3:19 – "$20 for 2.5 grams."
- 3:23 – "dude, we'd sell you quite a bit. We're needing money for food pretty bad."
- 3:46 – "where to you want to meet at?"
- 3:48 – "do you want to meet at Casey's?"
- 3:59 – "I'm here."
- 4:00 – "all right, man."
- 4:09 – "I'm sitting on the side."

(TR 684-687, 759; Ex. 32 A-D)

Gossett testified that he went to the gym as usual that day, and Stout stayed at the house (TR 224). When Gossett returned, Stout was gone; Gossett texted Stout and asked him if he was at the gym (TR 224). At 4:19 p.m., Stout texted Gossett stating, "I'm with Mase[4] now." (TR 224, 226; Ex. 3A).

Jorgensen and Nathan have very different versions of what happened when they met up with Stout:

Jorgensen's version of the initial assault

Jorgensen testified[5] that he and Nathan agreed to meet Stout at the old Casey's in Ava (TR 319). Jorgensen testified that they planned to take Stout to the woods to beat him up (TR 319, 323). They took Jorgensen's car to Casey's; Jorgensen was driving and Nathan was in the front passenger seat (TR 320). When they arrived, Stout got in the back seat of Jorgensen's car and he did not seem afraid (TR 320).[6]

[4] "Mase" was Nathan's nickname (TR 306).

[5] Jorgensen testified pursuant to a plea deal; he had made no statements for two years (TR 763). Before trial, Prosecutor Wall offered Jorgensen second degree murder with a twenty-year cap (TR 454-456, 460). Jorgensen also believed that attempted murder charges would not be brought against him for his attempt to shoot and kill Nathan in Texas County (TR 461-462).

[6] Jorgensen's car was captured on the Casey's surveillance video, which was admitted through a stipulation (TR 235-236, 324; Ex. 5).

They drove to the woods, and they all got out of the car (TR 325). Stout retrieved a bag of K2 from the car and handed it to Nathan (TR 325). According to Jorgensen, Stout and Nathan began dancing around and fighting like "a couple of girls" (TR 326, 442). Jorgensen got involved as a "matter of pride" (TR 442).

Jorgensen, who knew how to box, went over and hit Stout once with a left uppercut to the jaw (TR 327). Before hitting him, he said, "I told you I'd find you" (TR 436, 443). This punch immediately rendered Stout unconscious and he hit the ground (TR 328). He began shaking and convulsing (TR 328). Nathan was standing a few feet away (TR 328). Jorgensen then described how he "stomped" on Stout's chest, mid-section and face (TR 329). He was kicking and hitting Stout with his fists and feet (TR 330). Jorgensen said Nathan was poking at Stout and hit him with his fist (TR 330).

According to Jorgensen, Nathan asked him to pop the trunk of the car and Jorgensen did (TR 331). He said that Nathan got two ball bats out of the trunk and that they each had a bat (TR 331-332). Jorgensen said that he struck Stout numerous times in the chest and midsection and that Nathan also struck Stout numerous times (TR 333).

After this, Jorgensen said that they both dragged Stout by his feet to a brush pile about 20-30 feet away, and left him face up (TR 339, 346, 349). They left him for dead (TR 339). They returned to Jorgensen's house and Jorgensen bagged up his clothes in a plastic sack and put them in his trunk (TR 351).

Nathan's version of the initial assault

Nathan told law enforcement that he and Jorgensen picked up Stout at around 4:00 p.m. on December 13 (TR 718). Jorgensen was driving and Nathan was in the passenger

seat (TR 718). Nathan had set the meeting up (TR 719). When they got out of the car, Jorgensen hit Stout with an uppercut that knocked him out and put him into a seizure (TR 723). Jorgensen started kicking Stout all over his body (TR 723). Jorgensen then got two baseball bats out of the back of the car and handed him one; Jorgensen told Nathan to hit Stout (TR 723). He told Nathan, "hit him or you'll be next; I will kill you" (TR 775).

Jorgensen struck Stout repeatedly in the head and chest area, 10-20 times (TR 723, 732). Nathan admitted that he hit Stout one time in the stomach with the bat (TR 723, 732).[7] Nathan told the Sheriff that he was forced to participate in striking Stout (TR 742). Jorgensen told Nathan to get a hold of Stout and help him drag him over by the brush pile (TR 739)

Stout reported as missing

Stout was supposed to have dinner with his grandparents that evening (TR 185). When he did not show up, his grandfather contacted the Sheriff's office to see if he was in jail or if there had been any accidents (TR 186). None of the family had heard from him (TR 186). Stout's mother talked to Gossett and they learned about Stout's text that he was "with Mase now" (TR 187, 190). They took that information to the police (TR 187, 196-197).

[7] The initial autopsy report indicated that there was slight bruising in the abdomen under the skin; there was some impact in that area, but it was not made with as much force as the impact to the chest area (TR 756).

Gossett showed Stout's text to law enforcement and they took a picture of it (TR 266-267). Gossett did not want law enforcement to know that Stout was involved in selling K2, so he misled the Sheriff (TR 272); people then yelled at Gossett to tell the truth (TR 268). Gossett was crying and said that Stout went to meet "Mase" to rip him off on a drug deal (TR 269). Gossett later admitted that the earlier texts he sent might have made Jorgensen angry and Gossett wondered if what happened to Stout was his fault (TR 271).

Kayla Berry testified that she was with Nathan from 7:30-8:00 on the night of December 13; they drove out into the country, smoked K2 and had sex (TR 289, 297). Nathan picked her up in his Mustang; he was acting weird and kept watching his mirrors (TR 290-291).

Later that night, Gossett told Officer Tiffany Neill that Nathan's car was at Jorgensen's residence (TR 243). Officer Neill went to Jorgensen's residence at 10:30 p.m. (TR 244, 256). Jorgensen answered the front door with a large dog (TR 245, 251, 351). He told Officer Neill that she would have to meet Nathan on the side of the house (TR 245, 352). While Officer Neill was talking to Nathan, Jorgensen was standing on the front porch where he could see them (TR 247, 352). Officer Neill asked Nathan if he knew Stout, and he said "no" (TR 246). As Officer Neill left, she asked Jorgensen if he knew Stout, and he also lied and said that he did not (TR 247, 353)

Jorgensen's version of what happened after Officer Neill left his house

Jorgensen said that after Officer Neill left, he also left the house and drove to Judy Greuter's farm in Elk Creek, Missouri, to dispose of some evidence (TR 359, 364). Judy

lived in a house out in the country and she had a pond, burn barrel, and shed on her property (TR 362; Ex. 8). On the way to Judy's, he stopped in Mansfield to smoke "weed" with his friend, James Watson (TR 360, 493).

Jorgensen spent the night at Judy's (TR 364). While there, he threw the two baseball bats in the pond and he thought that they sank (TR 364).[8] He also put his clothes in the burn barrel, poured gasoline on them and burned them (TR 364-365).

Jorgensen left Judy's the next morning at around 6:00 a.m. and returned to his home (TR 366). Watson and his wife both testified that Jorgensen came by their home at 10:30 a.m. on the morning of December 14 and talked to Watson for about 15 minutes (TR 505, 530). Jorgensen said that he was coming from Judy's (TR 506).

Sometime during the late morning of December 14, some of Stout's family members arrived at Jorgensen's house looking for information (TR 355-358, 367-368). They wanted to talk to Nathan because of the text that Stout had sent, saying that he was with Nathan (TR 197-199). Jorgensen did not talk to them, but directed them around to the garage area where they could talk to Nathan (TR 355). Nathan was asleep on the couch and Jorgensen woke him up; he told him that there were some people there who wanted to talk to him (TR 356). Nathan went outside (TR 356).

Jorgensen overheard the family ask Nathan where Stout was at (TR 356). Stout's father then struck Nathan in the face with his fists (TR 214, 357, 469). Nathan's eyes

[8] Both bats were later recovered and one tested positive for the presence of Stout's blood (TR 569, 596-598, 827-828; Exs. 42 & 43).

welled up and he said, "What was that for?" in a whiny voice (TR 469). Jorgensen told the Stouts that he did not want that going on in his yard and he asked them to leave (TR 358, 469). The family said that they were going to the Sheriff[9] and that he was going to come back and raid the house (TR 358).

Jorgensen testified that when he saw Nathan get hit by Stout's father, it made him nervous (TR 368). Jorgensen considers himself to be cool and calm, while Nathan is a loud mouth and would not keep quiet about the crime (TR 368).

Jorgensen claimed that Nathan left his house for a couple of hours and then came back (TR 369). Jorgensen also claimed that Nathan said he went back out to where they had left Stout and he was still there, but he did not know if he was alive or dead (TR 370). Law enforcement would later find other tire tracks at the scene, up closer to where the body was; the tracks did not match the width of Nathan's Mustang's tires, but they did match the width of Jorgensen's Pontiac's tires exactly (TR 793-796, 820).

According to Jorgensen, at some point during the day on December 14, he and Nathan went back to the scene in Nathan's Mustang and parked approximately where they had parked the first time, when they had brought Stout there the previous afternoon (TR 370). This time, Jorgensen brought a hunting knife with him, concealed in his sleeve (TR 375; Ex. 12).

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[9] The Douglas County Sheriff, Chris Degase, is related to the Stout family, and to the victim, Kenny Stout (TR 206, 670-671). Degase said that this did not affect his handling of the case (TR 671).

According to Jorgensen, they both got out of Nathan's car and went up to Stout's body (TR 377). On the way there, they talked about making sure that Stout was dead (TR 375). Stout was still alive and breathing when they arrived; he was on his side in a fetal position (TR 375-376). Jorgensen claims that they both stabbed him (TR 377). Jorgensen said that he attempted to "end it quickly" by slicing Stout's throat, but Stout started to move and pull away, so he stabbed him in the ribs a couple more times (TR 377-378). Jorgensen saw Stout take his last breath (TR 758).

Jorgensen was sitting in the passenger seat of Nathan's car (TR 387). Although Jorgensen said that both he and Nathan both had blood on them from the stabbing (TR 387), the only blood found inside Nathan's car was on the passenger side where Jorgensen was sitting (TR 562-563, 784). This blood later tested positive as Stout's blood (TR 562-563, 615-616, 827-828). No blood was found in the driver's seat (TR 616).

Nathan's version of what happened after Officer Neill left Jorgensen's house

Nathan said that Jorgensen killed Stout on December 13th, after Officer Neill left Jorgensen's house, not on December 14th after the Stout family left Jorgensen's house (TR 745-746).[10] Nathan took law enforcement on a walk-through of the scene (Def. Ex. JJ). He said that Jorgensen told him to drive him back to the scene in his Mustang after

[10] Law enforcement agreed that it was not possible for Nathan to be with Jorgensen killing Stout on the afternoon of December 14th, because Nathan was at the Watson residence (TR 772).

Officer Neill left the house (TR 745-746; Ex. JJ). Jorgensen said that he had to make sure, and Nathan took this to mean that Jorgensen wanted to make sure that Stout was dead (TR 748-749).

Nathan said that he parked down by where they had pulled in the very first time; he waited in the car and smoked a cigarette while Jorgensen walked into the woods to the brush pile (TR 785; Ex. JJ). A cigarette that looked fairly recent was found near this location, but law enforcement did not submit it for testing (TR 609, 704, 708; Ex. 3J). It was dark, but he could see Jorgensen making up and down motions (TR 812; Ex. JJ). When Jorgensen returned to the car, Nathan saw him wipe a knife off on the grass (TR 812; Ex. JJ).

They returned to Jorgensen's house and Jorgensen left for Texas County at 11:30 p.m. (TR 768). Nathan slept on Jorgensen's couch that night (TR 769). Judy Greuter corroborated that Jorgensen spent the night at her house on the night of December 13 (TR 937). While he was there, Jorgensen told her that he was "off of his normal self." (TR 937). She asked him what was wrong, and he said that he had killed someone (TR 937).

On December 14, Jorgensen took the drug paraphernalia from his house and gave it to Nathan; he told Nathan to take it to James Watson's apartment in Mansfield, and to stay there (TR 389-390, 493). Jorgensen wanted to get rid of the drug paraphernalia because Stout's family said that they were bringing the Sheriff to his house (TR 389).

While Nathan followed Jorgensen's instructions and went to Watson's apartment with the drugs, Jorgensen said that he returned to Judy's farm to dispose of more evidence (TR 391-396). Jorgensen threw the knife into Judy's pond, and burned the

bloody clothes in her burn barrel (TR 395-396, 599-600, 634-637; Ex. 44). He was only there for about thirty minutes, and then he returned to his home in Ava (TR 397-398). Jorgensen changed into different clothes and told his wife that he would not be home until late that night or early the next morning (TR 398). Jorgensen then drove to Watson's apartment (TR 398).

Jorgensen's plot to kill Nathan at Judy's farm

When Jorgensen arrived at Watson's apartment, Watson asked him what was wrong with Nathan, stating that Nathan was "acting weird" (TR 399, 495). Jorgensen told Watson that he was going to take Nathan off his hands, and that he was going to take him to Judy's (TR 399). Jorgensen asked Watson to come with him (TR 399). After fifteen minutes at Watson's, they left; Watson rode with Jorgensen in Jorgensen's Pontiac, and Nathan followed them in his Mustang (TR 400).

According to Jorgensen, Nathan was "freaked out," and he was initially taking him to Judy's farm to hide him (TR 400-401). However, on the way there, he was thinking of options and ways to get rid of Nathan (TR 401). Nathan was so shaken up, that Jorgensen did not think that he could hold it together and keep his mouth shut (TR 401). He decided to kill Nathan (TR 409).

Watson testified that, on this drive to Judy's farm, Jorgensen told him that he was going to kill Nathan and that Watson was going to dig his grave (TR 496, 507). Jorgenson told Watson to "man up," and so Watson went along with it (TR 496). Watson had never really been scared of Jorgensen until that night (TR 503).

When they arrived at Judy's, they smoked some "weed" with her (TR 403). According to Jorgensen, Judy called him back to a room and asked him what was going on (TR 403). Jorgensen said he told her what had happened during the past two days (TR 403). Judy told him that Nathan was not going to hold up, and he was not going to be quiet (TR 403). Judy reminded Jorgensen that she had a backhoe and that she was there for him (TR 403). Judy told him where she kept her .25 pistol underneath the coffee table in the front room (TR 404).

Jorgensen's attempt to kill Nathan

Jorgenson, Watson and Nathan went outside, allegedly to move Nathan's Mustang into Judy's shed (TR 404). While Nathan was starting his car and pulling it up to the gate leading to the shed, Jorgensen said he was going back to the house to get keys to the gate (TR 410). He was really going back into the house to retrieve Judy's gun (TR 409). Jorgensen checked to see if it was loaded and it was (TR 410). He put it in his front pocket of his hoodie (TR 410).

When Jorgensen went back outside, he walked up to the gate and pretended that he had dropped the keys on the ground (TR 410). Nathan and Watson pulled out their cell phones to shine light on the ground to look for the keys (TR 410). As Nathan was bending over looking for the keys, Jorgensen pulled the gun out of his hoodie, put it to Nathan's head and pulled the trigger (TR 411, 496). The gun clicked and misfired (TR 411, 496). Jorgensen tried to fire again and the same thing happened (TR 411).

Nathan jumped a fence and took off running into the woods (TR 411, 496).[11] Jorgensen eventually got the gun to work and he fired two or three times in Nathan's direction, but it was dark and he did not know if he shot him (TR 412-414). He was trying to hit him (TR 414). Jorgensen lost sight of Nathan and he instructed Watson to go after him (TR 415). Watson did as he was told (TR 416). Watson was gone for a minute or two and then came back and told Jorgensen that he could not catch him (TR 416).

According to Jorgensen, he gave Watson the keys to his car and the .25 pistol and told him to go up the road and look for Nathan; if he found him, he should shoot him or run him over (TR 417).[12] Watson did what he asked him to do (TR 417). Meanwhile, Jorgensen went back to the house and grabbed a rifle out of Judy's house and took her farm truck to look for Nathan (TR 417).

Neither Jorgensen nor Watson found Nathan, and they returned to Judy's (TR 418). Jorgensen parked Judy's truck, wiped off her rifle and put it back in the house (TR 419). Jorgensen put the .25 in his car and told Watson to follow him in Nathan's Mustang (TR 419). Jorgensen thought about submerging Nathan's car in the Piney River, but they decided to park it in Houston, Missouri, at a McDonald's parking lot

[11] When Nathan jumped the fence, his jacket came off (TR 497); Jorgensen and Watson would later dispose of it in a dumpster in Mansfield (TR 428).

[12] Watson denied that he ever really searched for Nathan; he did a lot of things he did not want to do because he was scared of Jorgensen (TR 498, 504).

instead (TR 420-422, 499-500). They took Nathan's computer, clothes and wallet out of the car and wiped everything down (TR 422).

On their way back to Watson's apartment, they threw Nathan's wallet and laptop into Austin Lake (TR 423, 426).[13] They also took his cell phone apart and threw it over a bridge near the river (TR 425). They drove through Norwood and put the .25 pistol in a residential garbage can that was sitting at the end of a driveway (TR 427, 501-502).

When they arrived at Watson's apartment, they noticed that they still had Nathan's hoodie, so they threw it in a dumpster in the apartment complex (TR 428, 502). Jorgensen and Watson smoked a bowl of weed at Watson's apartment; Jorgensen told Watson to be quiet about what had happened (TR 429-430). When Jorgensen left Watson's, he returned to his home at approximately 2:00 a.m. (TR 431). Watson told his wife, Cheryl, that Jorgensen had killed Stout (TR 532).

Nathan flees from Jorgensen, finds help, and tells the police what happened to Stout

After Jorgensen attempted to murder him, Nathan escaped into the woods (TR 411, 496). He eventually made it to a residence in the Elk Creek area and began beating on the door (TR 512). The homeowner called 911 and law enforcement arrived (TR 512-513). Trooper Scott Nelson met with Nathan (TR 514). Nathan had been running and it was a cold, damp December night; he was underdressed, visibly shaking, covered in scratches and suffering from exposure (TR 515, 550). He was obviously frightened (TR

[13] Nathan's wallet was later recovered by a passer-by who saw it floating near the edge (TR 645; Ex. 19).

515, 518, 550, 575). Nathan told him that somebody had tried to kill him, and that he had information about a missing boy in Ava named Kenny (TR 514).

Initially, Nathan gave law enforcement little information about Stout; he did not tell them that Stout was dead (TR 557-558).[14] He asked them to protect him from Jorgensen and to put him in protective custody (TR 575, 699, 765). Nathan was afraid to go back with them to Judy's farm to show them where Jorgensen had tried to kill him (TR 576). Nathan had a hard time directing them to the farm because he was not familiar with the area, but they finally found it (TR 554).

The Douglas County Sheriff promised Nathan that he could keep him safe from Jorgensen (TR 699). Nathan asked to be locked in the Ava Police Department jail to keep Jorgensen away from him (TR 766). The Sheriff was concerned about Nathan's safety; he decided to put him in a temporary holding cell at the jail until they could interview him (TR 710-711, 766). They explained to Nathan that he was not under arrest, but that they would be able to keep him safe at the jail; Nathan agreed (TR 711, 717).

After Nathan was in protective custody and Jorgensen had been found and placed under arrest, Nathan gave them more information about Stout (TR 774). He agreed to show them the location of Stout's body and take them on a walk-through of the scene (TR 655, 695, 787; Ex. JJ). He gave consent to search his car (TR 651-652, 787; Ex. 45).

[14] Watson also did not immediately provide information to law enforcement about Kenny's death when he was first questioned (TR 560).

Dr. James Anderson conducted an autopsy on Stout (TR 890). However, before Nathan's trial, Dr. Anderson passed away (TR 890). Defense counsel stipulated to the admission of the original autopsy report, and waived any confrontation objections, because the report found that the cause of death was due to the knife wounds and not the assault (TR 884).

The State called Dr. Carl Stacy, who reviewed Dr. Anderson's work and arrived at his own independent conclusions (TR 895). Dr. Stacy did not believe that Stout would have survived the blunt force injuries from the assault, but in any event, those injuries would have speeded up the dying process from the stab wounds (TR 923-924). The official autopsy report stated that Stout's cause of death was sharp-force injuries resulting in exsanguination or severe blood loss (TR 924).

When Stout's mother was testifying as the second witness, Prosecutor Wall showed her Exhibit #1B, a split screen of two photos: one of Stout alive, and one of him dead, covered in blood (TR 200). Apparently, the prosecutor did not warn Ms. Stout in advance of the pictures, and when he showed it to her, she cried out "Oh, my God!" (TR 200). The trial court agreed that Ms. Stout burst into tears, had a very large reaction in front of the jury, and it was a "very painful event" for her to see the picture (TR 203). The prosecutor apologized and a recess was taken for Ms. Stout to regain her composure (TR 200). The trial court denied defense counsel's request for a mistrial (TR 201-202).

At a sidebar during Jorgensen's testimony, Prosecutor Wall wanted to ask Jorgensen if Nathan acted or portrayed himself as a "gangster" (TR 313). Wall said that "he's got gangster tattoos all over him." (TR 313). The Court agreed with defense

counsel that this was bad character evidence, which could not come in unless Nathan testified (TR 313). Later, co-defense counsel told the court that he stayed at counsel table during that sidebar to see if he could hear what was being said (TR 341). Counsel said that it was "loud and clear" to the jury that Prosecutor Wall had mentioned that Nathan had "gang tattoos" and jurors were taking notes at the time (TR 341). Defense counsel requested to voir dire the jury to see if they had heard anything (TR 341). The trial court agreed that comments at the bench had "been loud enough that the jury on occasion could hear, and it worried me" (TR 342). The court also noted that "we just don't have a good alternative place for a sidebar, unless we send them out every time," and it asked the attorneys to be more conscious of whispering and being quiet (TR 342). The Court admonished the jury that none of the conferences at the bench are evidence and they are to disregard anything they overhear (TR 343-344).

Jury Instructions

As to Count I, the jury was instructed on first degree murder, second degree murder, and voluntary manslaughter under an accomplice liability theory (LF 73-74, 76-77, 79-80). The jury was also given an instruction on the defense of duress (LF 91-92). Defense counsel also requested an instruction on involuntary manslaughter, which was refused (TR 1033-1035). The trial court did not believe that involuntary manslaughter was supported by the evidence (TR 1035). The proposed instruction was labeled "OO" (LF 101), and it read:

INSTRUCTION NO. _____

As to Count I, if you do not find the defendant guilty of voluntary manslaughter, you must consider whether he is guilty of involuntary manslaughter in the first degree.

A person is responsible for his own conduct and he is also responsible for the conduct of another person in committing an offense if he acts with the other person with the common purpose of committing that offense or if, for the purpose of committing that offense, he aids or encourages the other person in committing it.

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First that on or about December 13, 2011, in the County of Douglas, State of Missouri, the defendant or Christopher Jorgensen caused the death of Kenny Stout by stabbing him, and

Second, that defendant or Christopher Jorgensen recklessly caused the death of Kenny Stout, then you are instructed that the offense of involuntary manslaughter has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Third, that with the purpose of promoting or furthering the commission of that involuntary manslaughter, the defendant acted together with or aided Christopher Jorgensen in committing the offense, then you will find the defendant guilty under Count I unless you find and believe it is more probably true than not true that the defendant is not guilty by reason of duress as submitted in Instruction No. ___.

MAI-CR3d 304.04, 314.10 (modified) 310.24

Submitted by the Defendant

(LF 101).

After nearly five and a half hours of deliberation, the jury returned verdicts of guilt for second degree murder, the corresponding armed criminal action and abandonment of a corpse (LF 103-105; TR 1054, 1061-1062).

The trial court sentenced Nathan to life imprisonment on Count I, a concurrent five year sentence on Count II, and a consecutive four year sentence on Count III (Sent. TR 54; LF 118-119). A timely notice of appeal was filed (LF 121-122), and this appeal follows.

POINTS RELIED ON

I.

The trial court erred in refusing to instruct the jury on involuntary manslaughter, a nested lesser included offense of first and second degree murder, because the failure to so instruct violated Nathan's rights to due process of law and to present a defense as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offenses and a conviction only on the lesser, since recklessness is automatically established through knowing conduct under Section 562.021, and the jury could have found that Nathan acted recklessly rather than knowingly, especially when the issue of duress may be considered by the jury under the manslaughter, but not the murder, instructions. Further, Nathan was prejudiced because his jury went down to second degree murder, but the voluntary manslaughter instruction did not fully test the mental element of that crime as it involved the additional element of sudden passion.

State v. Jackson, 433 S.W.3d 390 (Mo. banc 2014);

State v. Roberts, 465 S.W.3d 899 (Mo. banc 2015);

State v. Frost, 49 S.W.3d 212 (Mo. App. W.D. 2001);

U.S. Const., Amends 6 & 14;

Mo. Const., Art. I, Sections 10 & 18(a);

Sections 556.046, 562.016, 562.021, 562.071; and

Rules 28.03 & 29.11.

II.

The trial court abused its discretion in not declaring a mistrial and allowing the jury to consider, over objection, Shon Gossett's testimony that Nathan was "messing with my 16-year-old cousin" and that he was "too old to be with my 16-year-old cousin," because this ruling violated Nathan's rights to due process of law and to be tried only for the offenses with which he was charged, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, in that this uncharged misconduct was not legally relevant to Nathan's guilt but was introduced to try and convince the jury that Nathan was a person of bad character who was more likely to commit the crime with which he was charged, and even though the trial court initially sustained defense counsel's objection, the prosecutor elicited the uncharged conduct a second time, and admitted that he had not admonished Gossett not to talk about that conduct, and the trial court's instruction to the jury to "disregard the last sentence that [Gossett] made" was ineffective because the offending comment was not the last sentence that Gossett made.

State v. Watson, 968 S.W.2d 249 (Mo. App. S.D. 1998);

State v. Milligan, 654 S.W.2d 204 (Mo. App. W.D. 1983);

State v. Taylor, 739 S.W.2d 220 (Mo. App. S.D. 1987);

U.S. Const., Amend. 14;

Mo. Const., Art. I, Secs. 10, 17 and 18(a); and

Rule 29.11.

III.

The trial court plainly erred in failing to declare a mistrial, *sua sponte*, after the trial court determined that the sidebar wherein the prosecutor mentioned that Nathan had "gangster tattoos all over him," could be heard by the jury, because this ruling violated Nathan's rights to due process of law and to be tried only for the offenses with which he was charged, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, in that this uncharged misconduct was not legally relevant to Nathan's guilt but was the type of information that could convince the jury that Nathan was a person of bad character who was more likely to commit the crime with which he was charged, and the jury had already heard additional uncharged misconduct through a previous witness, resulting in manifest injustice.

State v. Driscoll, 55 S.W.3d 350 (Mo. 2001);

State v. Burnfin, 771 S.W.2d 908 (Mo. App. W.D. 1989);

State v. Tiedt, 206 S.W.2d 524 (Mo. banc 1947);

U.S. Const., Amends 6 & 14;

Mo. Const., Art. I, Sections 10, 17 & 18(a); and

Rule 30.20.

IV.

The trial court abused its discretion in overruling Nathan's motion for a mistrial when Marianne Stout, the victim's mother, screamed from the witness stand, "Oh my God!" and burst into tears and had a "very big reaction in front of the jury" when the prosecutor showed her a graphic split-screen picture of her son alive and dead, causing a recess in the proceedings, because this ruling violated Nathan's right to due process and a fair trial, guaranteed by the 6th & 14th Amendments to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that this outburst occurred at the outset of the trial and was caused by the prosecutor's apparent failure to prepare Ms. Stout before showing her the picture on the witness stand, to purposefully evoke an emotional response from her, and it prevented the jury from listening to further evidence and deciding the case in an objective fashion.

State v. Brooks, 960 S.W.2d 479 (Mo. banc 1997);

State v. Connor, 252 S.W. 713 (Mo. 1923);

State v. Johnson, 672 S.W.2d 160 (Mo. App. E.D. 1984);

U.S. Const., Amends 6 & 14;

Mo. Const., Art. I, Sections 10 & 18(a); and

Rule 29.11(d).

ARGUMENTS

I.

The trial court erred in refusing to instruct the jury on involuntary manslaughter, a nested lesser included offense of first and second degree murder, because the failure to so instruct violated Nathan's rights to due process of law and to present a defense as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that there was a basis in the evidence for an acquittal of the higher offenses and a conviction only on the lesser, since recklessness is automatically established through knowing conduct under Section 562.021, and the jury could have found that Nathan acted recklessly rather than knowingly, especially when the issue of duress may be considered by the jury under the manslaughter, but not the murder, instructions. Further, Nathan was prejudiced because his jury went down to second degree murder, but the voluntary manslaughter instruction did not fully test the mental element of that crime as it involved the additional element of sudden passion.

Standard of Review

This Court's review of the circuit court's decision to give or refuse a requested jury instruction under ***Section 556.046*** is *de novo.* ***State v. Jackson***, 433 S.W.3d 390, 395 (Mo. banc 2014). "[I]f the statutory requirements for giving such an instruction are met, a failure to give a requested instruction is reversible error." *Id.* (footnote omitted).

Facts and Preservation

Nathan's defense was that he struck Stout one time during the initial assault, out of fear that Jorgensen would kill him if he did not, but that he did not participate in the stabbing of Stout later that evening, even though he was present at the scene because Jorgensen made him drive him back to the scene (Ex. JJ; TR 1004-1005). Jorgensen testified that Nathan also participated in the stabbing (TR 375-378). The absence of Stout's blood on Nathan's side of the car, but its presence on Jorgensen's side of the car, supports an inference that Nathan either did not participate in the stabbing at all, or that his involvement, if any, was minimal (TR 562-563, 615-616, 827-828). Based on this evidence, defense counsel requested the following instruction on involuntary manslaughter:

INSTRUCTION NO. _____

As to Count I, if you do not find the defendant guilty of voluntary manslaughter, you must consider whether he is guilty of involuntary manslaughter in the first degree.

A person is responsible for his own conduct and he is also responsible for the conduct of another person in committing an offense if he acts with the other person with the common purpose of committing that offense or if, for the purpose of committing that offense, he aids or encourages the other person in committing it.

As to Count I, if you find and believe from the evidence beyond a reasonable doubt:

First that on or about December 13, 2011, in the County of Douglas, State of Missouri, the defendant or Christopher Jorgensen caused the death of Kenny Stout by stabbing him, and

Second, that defendant or Christopher Jorgensen recklessly caused the death of Kenny Stout, then you are instructed that the offense of involuntary manslaughter has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Third, that with the purpose of promoting or furthering the commission of that involuntary manslaughter, the defendant acted together with or aided Christopher Jorgensen in committing the offense, then you will find the defendant guilty under Count I unless you find and believe it is more probably true than not true that the defendant is not guilty by reason of duress as submitted in Instruction No. ___.

MAI-CR3d 304.04, 314.10 (modified) 310.24

Submitted by the Defendant

(LF 101; TR 1033-1035; Appendix 3).

The trial court did not believe that involuntary manslaughter was supported by the evidence, and denied the Instruction, labeling it "OO" (TR 1035; LF 101; Appendix 3).

As to Count I, the jury was instructed on first degree murder, second degree murder, and voluntary manslaughter under an accomplice liability theory (LF 73-74, 76-77, 79-80). A duress instruction was also given (LF 91-92). The defense renewed the failure to give the proposed involuntary manslaughter instruction as error in Nathan's

motion for new trial (LF 108). Therefore, this issue is preserved for review. ***Rules 28.03*** and ***29.11(d)***.

Legal Analysis

The trial court instructed the jury on first degree murder, which required the jury to find that: (1) Defendant and Christopher Jorgensen caused the death of Kenny Stout by beating and stabbing him, and (2) that defendant and Christopher Jorgensen knew or was aware that their conduct was practically certain to cause the death of Kenny Stout, and (3) that defendant and Christopher Jorgensen did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief, and (4) that with the purpose of promoting or furthering the commission of that murder in the first degree, the defendant acted together with or aided Christopher Jorgensen in committing the offense. (LF 73-74). The jury did not find Nathan guilty of first degree murder.

The trial court also instructed the jury on second degree murder, which required the jury to find that: (1) defendant and Christopher Jorgensen caused the death of Kenny Stout by beating and stabbing him, and (2) defendant and Christopher Jorgensen knew or was aware that their conduct was practically certain to cause the death of Kenny Stout, and (3) that defendant and Christopher Jorgensen did not do so under the influence of sudden passion arising from the adequate cause, and (4) that with the purpose of promoting or furthering the commission of that murder in the second degree, the defendant acted together with or aided Christopher Jorgensen in committing the offense (LF 76-77). Nathan was found guilty under this instruction (LF 103).

The trial court also instructed the jury on voluntary manslaughter.[15] That instruction is identical to the second degree murder instruction, without the language of "sudden passion," but with the duress language added (LF 79-80).

The proposed involuntary manslaughter instruction would have required the jury to find that: (1) defendant or Christopher Jorgensen caused the death of Kenny Stout by stabbing him, and (2) defendant or Christopher Jorgensen recklessly caused the death of Kenny Stout, and (3) that with the purpose of promoting or furthering the commission of that involuntary manslaughter, the defendant acted together with or aided Christopher Jorgensen in committing the offense, unless he is not guilty by reason of duress.

The first degree murder, second degree murder, voluntary manslaughter and involuntary manslaughter instructions all would have required the jury to find that Nathan was complicit in causing the death of Stout, and with the same type of conduct, stabbing.

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[15] Since, under this instruction, the jury was required to find that death was caused by beating *and* stabbing, it is unclear what evidence could have supported "sudden passion" arising out of provocation by Kenny Stout at the time of the stabbing. He was unconscious. Since the jury necessarily did not find the element of "sudden passion," when it found Nathan guilty of second degree murder, in the absence of an involuntary manslaughter instruction, the jury was never given the opportunity to evaluate the defense of duress as applied to Count I, because duress does not apply to murder. ***Section 562.071.2(1)***.

The distinction between these instructions is Nathan's mental state: Whether he took any action that caused Stout's death in a deliberated, knowing or reckless manner.

A person "acts knowingly" "[w]ith respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result." ***§ 562.016.3(2), RSMo 2000***. A person "acts recklessly" "when he consciously disregards a substantial and unjustifiable risk ... that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." ***§ 562.016.4***.

In ***State v. Roberts***, 465 S.W.3d 899 (Mo. banc 2015), and its companion case, ***State v. Randle***, 465 S.W.3d 477 (Mo. banc 2015), this Court held that a defendant is entitled, upon proper request, to an instruction on a "nested" lesser-included offense – i.e., an offense separated from the greater offense by one differential element for which the state bears the burden of proof. "[T]he jury's right to disbelieve all or any part of the evidence, and its right to refuse to draw any needed inference, is a sufficient basis in the evidence to justify giving any lesser included offense instruction when the offenses are separated only by one differential element for which the state bears the burden of proof." ***Roberts***, 465 S.W.3d at 901-902, quoting ***State v. Jackson***, 433 S.W.3d 390, 401 (Mo. banc 2014).

In ***Roberts***, the State had argued that third-degree domestic assault was not a "nested" lesser-included offense within the offense of second-degree domestic assault because the different mental states did not constitute differential elements. 465 S.W.3d at 902. This Court rejected the State's argument, explaining that third-degree domestic

assault is a "nested" lesser-included offense of second-degree domestic assault because the different mens rea requirements between the two are differential elements on which the State bears the burden of proof. *Id.* This Court further explained that ***Section 562.021.4***, provides that "knowingly" engaging in criminal conduct establishes that the conduct was also "reckless." *Id.* Therefore, if Mr. Roberts "knowingly" inflicted physical injury, he necessarily engaged in conduct sufficient to establish that he "recklessly" inflicted physical injury. *Id.* at 902-903.

Under the same logic of ***Roberts*** and ***Randle***, *supra*, involuntary manslaughter is also a "nested" lesser-included offense of first and second degree murder, because the differential element is the mental state – knowingly versus recklessly. Here, Nathan timely requested an involuntary manslaughter instruction during the instruction conference (TR 1034-1035; LF 101). It is clear that there was a basis to acquit Nathan of second degree murder and convict him of involuntary manslaughter based on the different mental states. The jury did not have to believe that Nathan stabbed Stout at all, or if he did, that he knowingly, rather than recklessly caused Stout's death. The trial court erred by refusing to submit Nathan's proffered jury instruction on the "nested" lesser-included offense of involuntary manslaughter because there was a basis in the evidence for convicting Nathan of that offense. Such error requires a new trial. *See* ***Roberts***, 465 S.W.3d at 901.

However, the State asserts that this Court must analyze the prejudice resulting from the trial court's error in failing to properly instruct on the nested lesser-included offense of involuntary manslaughter. The State posits that because a voluntary

manslaughter instruction was given, and not found by the jury, that Nathan suffered no prejudice from the trial court's failure to further instruct on involuntary manslaughter. But the obvious error in this logic is that voluntary manslaughter is not a "nested" lesser offense because the mental state is not the differential element between voluntary manslaughter and second degree murder. Stated another way, the voluntary manslaughter instruction did not test the mental state element of the second degree murder instruction in the same way that an involuntary manslaughter instruction would have done.

"[T]he crime of voluntary manslaughter is defined as causing the death of another person under circumstances that would constitute murder in the second degree, except that the death was caused 'under the influence of sudden passion arising from adequate cause.'" ***State v. Redmond***, 937 S.W.2d 205, 208 (Mo. banc 1996) (quoting ***§ 565.023***). "Sudden passion" is defined as "passion directly caused by and arising out of provocation by the victim or another acting with the victim which passion arises at the time of the offense and is not solely the result of former provocation[.]" ***§ 565.002(7)***. "Adequate cause" is "cause that would reasonably produce a degree of passion in a person of ordinary temperament sufficient to substantially impair an ordinary person's capacity for self-control[.]" ***§ 565.002(1)***. The offense must have been committed in sudden passion, and not after there has been time for the passion to cool. ***State v. Fears***, 803 S.W.2d 605, 609 (Mo. banc 1991).

A voluntary manslaughter instruction is not a "nested" lesser instruction of first or second degree murder because it requires additional evaluations regarding the alleged

provocation by the victim, whether such provocation amounted to "adequate cause," and whether sudden passion arose from such adequate cause. "[W]here the lesser offense that was actually submitted at trial did not 'test' the same element of the greater offense that the omitted lesser offense would have challenged," it cannot be said that prejudice did not result from the failure to give a lesser instruction that actually did test the same element. *See* ***State v. Frost***, 49 S.W.3d 212, 219–20 (Mo. App. W.D. 2001); ***Briggs v. State***, 446 S.W.3d 714, 720 n. 9 (Mo. App. W.D. 2014); and ***State v. Nutt***, 432 S.W.3d 221, 224–25 (Mo. App. W.D. 2014).

In ***Frost,*** 49 S.W3d at 216, the jury convicted Ms. Frost of the greater offense when presented with the options of second-degree murder and voluntary manslaughter. The second-degree murder instruction required that the jury find that Ms. Frost did not act under the influence of sudden passion, but in all other respects, the instruction were virtually identical. *Id.* at 222. On appeal, Frost raised as error the trial court's failure to also give an involuntary manslaughter instruction. *Id*. at 216.

The State's claim on appeal was that there was no prejudice to Frost because this Court had consistently held that when a jury is presented with instructions on both first-degree and second-degree murder and it finds the defendant guilty of murder in the first degree, no prejudice results from a court's failure to give an instruction on an even lesser-included offense. *See* ***State v. Hall***, 982 S.W.2d 675, 682 (Mo. banc 1998). In reversing Frost's conviction, the Western District could not find that the jury was adequately tested on the elements of second-degree murder to the extent that submission of involuntary manslaughter would have made no difference. The Court noted that the second-degree

murder and voluntary manslaughter instructions asked whether the defendant acted purposefully and that the sole different element between the two was whether the defendant did so under the influence of sudden passion. *Id.* at 219–20. However, the proffered involuntary manslaughter instruction asked whether the defendant acted purposefully in causing the victim's death, but did so with 'an unreasonable belief' in using deadly force to preserve her life. *Id.* at 220. The Court concluded that because the involuntary manslaughter instruction offered a basis that had not been before the jury and thus had yet to be rejected, "a reasonable basis exist [ed] upon which the jury could have exercised greater leniency." *Id.* at 221. Therefore, it could not conclude that "the jury was adequately tested on the elements of second-degree murder to the extent that submission of involuntary manslaughter would have made no difference," and remanded the case for a new trial. *Id.*

Likewise, in ***State v. Nutt***, *supra*, the elements of first-degree assault were not adequately tested. 432 S.W.3d at 225. The proffered third-degree assault instruction asked whether Mr. Nutt attempted to cause physical injury. *Id.* The submitted first and second-degree assault instructions did not ask that question, but rather asked whether Mr. Nutt's attempt to cause serious physical injury was done with sudden passion. *Id.* Because the jury did not have before it a question of whether Mr. Nutt intended his actions to cause only physical injury, the Court could not conclude that the elements of first-degree assault were adequately tested by the second-degree assault instruction. *Id.* Accordingly, Mr. Nutt was prejudiced by the trial court's refusal of his instruction for third-degree assault and his conviction and sentence were reversed. *Id.*

Similarly, in Nathan's case, the sole differentiating element between the second-degree murder instruction and the voluntary manslaughter instruction was whether the defendant was under the influence of sudden passion arising from adequate cause when he knowingly or purposely caused Stout's death. *See* ***Nutt***, 432 S.W.3d at 225; ***Frost***, 49 S.W.3d at 220. "By convicting on second-degree murder, and not voluntary manslaughter, the jury determined that [the defendant] did not cause [the victim's] death under the influence of sudden passion arising from adequate cause." ***Frost***, 49 S.W.3d at 220. But the voluntary manslaughter instruction did not test whether the jury might have found that Nathan acted with a lesser mental state than knowingly or purposely, only whether or not sudden passion was involved. Under such circumstances, "[t]his court cannot say that the jury was adequately tested on the elements of second-degree murder to the extent that submission of involuntary manslaughter would have made no difference." *Id.* at 221.

Instead of inferring from the evidence that Nathan, in stabbing the victim, was aware that his conduct was practically certain to cause Stout's death, the jury could have inferred from Jorgensen's testimony that, while Nathan participated in stabbing Stout, he consciously disregarded a substantial and unjustifiable risk that doing so would cause Stout's death and that such disregard constituted a gross deviation from the standard of care which a reasonable person would exercise in the situation. Further, because the evidence was sufficient to prove that Nathan acted with the higher mental state of knowingly, the evidence was necessarily sufficient, pursuant to ***Section 562.021.4***, to prove that he acted with the lower mental state of recklessly. ***Roberts***, *supra*.

This distinction is important because Nathan presented a legitimate case that he acted under duress. Nathan was smaller and weaker than Jorgensen and, in fact, Jorgensen later attempted to murder Nathan to silence him (TR 411, 496). Jorgensen also threatened other people to assist in the cover up of what he had done to Stout, including killing Nathan (TR 498, 504). Law enforcement testified that Nathan exhibited fear of Jorgensen until he was under their protection (TR 699, 710-711 766, 774). But under the instructions for first and second degree murder, Nathan's jury was not allowed to consider duress. ***Section 562.071.2(1).*** While the jury may have ultimately decided under the duress instruction that Nathan "recklessly place[d] himself in a situation in which it was probable he would be subjected to threatened use of force" from Jorgensen, and that he, therefore, could not be absolved of culpability altogether, it still could have found that Nathan acted recklessly in his actions (LF 91-92). ***Section 562.071.2(2)***. This is especially true given the fact that the blood evidence was connected to Jorgensen's side of the car and not Nathan's, leading to an inference that Nathan's involvement in the stabbing, if any, was minimal (TR 562-563, 615-616, 827-828), and the fact that he cooperated with the police (TR 655, 695, 787; Ex. JJ). This jury certainly did not believe that Nathan was culpable for the charged offense of first degree murder.

Under all of these circumstances, the submission of the voluntary manslaughter instruction does not serve to rebut the presumption that Nathan was prejudiced by the trial court's failure to submit the requested involuntary manslaughter instruction. Therefore, he respectfully requests that this Court reverse his second degree murder conviction, as well as the corresponding armed criminal action conviction

II.

The trial court abused its discretion in not declaring a mistrial and allowing the jury to consider, over objection, Shon Gossett's testimony that Nathan was "messing with my 16-year-old cousin" and that he was "too old to be with my 16-year-old cousin," because this ruling violated Nathan's rights to due process of law and to be tried only for the offenses with which he was charged, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, in that this uncharged misconduct was not legally relevant to Nathan's guilt but was introduced to try and convince the jury that Nathan was a person of bad character who was more likely to commit the crime with which he was charged, and even though the trial court initially sustained defense counsel's objection, the prosecutor elicited the uncharged conduct a second time, and admitted that he had not admonished Gossett not to talk about that conduct, and the trial court's instruction to the jury to "disregard the last sentence that [Gossett] made" was ineffective because the offending comment was not the last sentence that Gossett made.

Standard of Review

It is frequently noted that the admissibility of evidence is within the discretion of the trial court. *See, e.g.*, ***State v. Morrow***, 968 S.W.2d 100, 106 (Mo. banc 1998). While that may be generally the case, it is nevertheless inaccurate where an evidentiary principle or rule is violated, especially in criminal cases. ***State v. Walkup***, 220 S.W.3d

748, 756 (Mo. banc 2007). In determining admissibility of evidence, the trial court has a "measure of discretion," but "the question of admissibility is basically a question of law subject to appellate review. Discretion is not a complete answer." ***State v. Williams***, 673 S.W.2d 32, 35 (Mo. banc 1984).

Facts and Preservation

At some point, Stout and Gossett got into a texting "war" with Nathan (TR 219). When testifying about this, Gossett stated that Nathan was "messing with my 16-year-old cousin" (TR 219). Defense counsel objected to this testimony as a "prior bad act," and the trial court sustained the objection (TR 219). Later in Gossett's testimony, the prosecutor asked Gossett if he knew how old [Nathan] was, and Gossett replied, "I knew he was too old to be with my 16-year-old cousin" (TR 232). Defense counsel again objected and asked for a mistrial, noting that you cannot unring a bell that has been rung twice before the jury (TR 232). The prosecutor apologized, stating, "I should have maybe talked to him" (TR 232). The trial court denied the request for mistrial, and instructed the jury to disregard, "the last sentence that he made" (TR 233). However, the last sentence made by Gossett was "I don't know." (TR 233).

Nathan moved in limine to preclude any evidence of prior crimes, which was sustained (LF 49; 2/8/13 TR 13). He objected when the prosecutor violated this ruling at trial by eliciting such evidence (TR 219, 232-233), and he raised the error in his motion for new trial (LF 107). Therefore, this allegation of error is preserved for review. ***Rule 29.11(d)***.

Legal Analysis

Based upon Article I, §§17 and 18(a) of the Missouri Constitution**,** well-established Missouri law requires the State to try a criminal defendant only for the offense for which he is on trial. ***State v. Ellison***, 239 S.W.3d 603, 606 (Mo. banc 2007). Generally, evidence of other crimes or bad acts is inadmissible to show the defendant's propensity to commit the offense for which he is on trial. ***State v. Batiste***, 264 S.W.3d 648, 650-51 (Mo. App., W.D. 2008). Further, "the prosecution may not attack the [defendant's] character ... unless he first puts his character in issue by offering evidence of good character...." ***State v. Milligan***, 654 S.W.2d 204, 209 (Mo. App. W.D. 1983).

Propensity evidence involves several significant risks, including: (1) evidence of other crimes or bad acts may mislead or confuse the jury, (2) the jury may give undue weight to the "if he did it once, he'll do it again" inference, which is the essence of propensity (3) the defendant may be compelled to defend against any prior, similar behavior that the State did not prosecute; and (4) the jury, in its rush to punish the defendant for his past acts-which the jury must infer have gone unpunished-may overlook the fact that the State has failed to prove the defendant guilty of the charged offense. ***Batiste***, 264 S.W.3d at 650-51, *citing* ***State v. Berwald***, 186 S.W.3d 349, 358 (Mo. App. W.D. 2005).

Uncharged crimes evidence is admissible, only if the evidence is legally and logically relevant. ***State v. Chism***, 252 S.W.3d 178, 184 (Mo. App. W.D. 2008). "The test for relevancy is whether an offered fact logically tends to prove or disprove a fact in issue or corroborates other relevant evidence." ***State v. Alexander***, 875 S.W.2d 924, 928

(Mo. App. S.D. 1994). Evidence is legally relevant when it has some legitimate tendency to clearly establish Appellant's guilt for the charged crime and is legally relevant when the probative value outweighs the prejudicial effect. ***Chism***, 252 S.W.3d at 184. Because of the dangerous tendency and misleading force of evidence of other crimes, its admission should be subjected by the courts to rigid scrutiny. ***State v. Primers***, 971 S.W.2d 922, 929 (Mo. App. W.D. 1998).

The trial court's erroneous admission of irrelevant evidence can violate a defendant's due process rights. ***State v. Barriner***, 34 S.W.3d 139 (Mo.banc 2000). Erroneously admitting evidence of other crimes or bad acts is presumptively prejudicial and unless the offenses are clearly connected, the defendant should be given the benefit of the doubt and the evidence excluded. ***State v. Brown***, 670 S.W.2d 140, 141 (Mo. App. S.D. 1984); ***State v. Randolph,*** 698 S.W.2d 535, 541 (Mo. App. E.D. 1985). The introduction of testimony that serves only to inflame and prejudice the jury can warrant a new trial. ***State v. Olson***, 854 S.W.2d 14, 15 (Mo. App. W.D. 1993).

Here, the evidence of Nathan's prior alleged acts of "messing with" an under-aged girl was neither logically nor legally relevant. The "other crimes" evidence in this case only served to divert the jury's attention and it should have been excluded. In ***State v. Watson***, 968 S.W.2d 249, 253 (Mo. App. S.D. 1998), the Court addressed a situation wherein the defendant, who was convicted of leaving the scene of an accident, claimed the trial court abused its discretion in overruling his objection to the introduction of evidence concerning his assault on his wheelchair-bound mother, in that this evidence was irrelevant to any issue at trial and highly prejudicial to the defendant.

Prior to trial, Watson filed a motion in limine to exclude any evidence concerning his assault upon his mother. ***Id***. The State argued such evidence could be introduced because the investigation linked to the assault at Watson's home led to the evidence that he had been involved in an accident. ***Id***. The State also maintained that Watson's assault upon his mother after she denied him the money to repair his car was evidence that he knew he had caused property damage during the accident and wanted to cover up his crime. ***Id***. The trial court agreed. ***Id***.

The State's first witness was Officer Allen. ***Id***. Officer Allen repeatedly referred to the assault upon Watson's mother. ***Id***. Officer Allen testified about a conversation he had with Watson, in which Watson denied hitting his mother but admitted pushing her in her wheelchair into another room. ***Id***.

Another State witness, Kathleen Moreland, also made numerous references to the assault during her testimony. ***Id***. Moreland testified that she called the police to Watson's home because "he had started hitting on his mother[.]" ***Id***. She also testified, "When he started in on her, I tried to intervene." ***Id***. Moreland said, "I called [the police] there for him hitting on his mother ..." ***Id***.

At the close of evidence, Watson made a motion for mistrial based upon the introduction of evidence of "prior bad acts" by him. ***Id***. This motion was denied. ***Id***. In reversing for a new trial, the appellate court noted that courts should be wary of evidence concerning other crimes because of the prejudicial nature of such evidence. ***Id***. "The difficulty with evidence of other crimes is that it tends to run counter to the rule that prevents using a defendant's character as the basis for inferring guilt." ***Id***. The appellate

court noted that the State initially convinced the trial court the evidence that Watson had assaulted his wheelchair-bound mother was necessary to show why the police came to arrest him. ***Id***. at 254. But the appellate court disagreed noting that the evidence did not have probative value as to any issue in the case. The court believed the evidence that Watson assaulted his mother had such limited probative value in the face of its highly prejudicial nature that the trial court erred in its admission. ***Id***.

The court also found that it was unable to declare a belief that the admission of this improper evidence was harmless beyond a reasonable doubt. ***Id***. The record failed to demonstrate that Watson was not injured by the error or that the jury disregarded or could not have been influenced by the evidence. ***Id***. The testimony concerning the assault was extensive. ***Id***. The cumulative effect of this testimony clearly had to have had an impact on the jury. ***Id***. Further, there was nothing in the record to indicate that the jury disregarded this information or could not have been influenced by it. ***Id***. Thus, the trial court prejudicially erred in allowing the admission of this evidence and in denying Watson's motion for mistrial. ***Id***.

In ***Milligan***, 654 S.W.2d at 208, the State elicited that "when drunk, [Milligan] became extremely violent." Milligan's attorney objected several times, and the trial court sustained most of them, instructing the jury to disregard the improper answers. ***Id.*** The court, however, let a witness describe Milligan as "mouthy, pushy, and wanting to fight everyone" when he drank. ***Id.*** Milligan objected to this character attack as irrelevant since he had not offered any evidence of his "good character." ***Id***. The appellate court agreed that the State had tried to impress on the finder of fact that Milligan was a violent

drunk. ***Id.*** "The theory apparently was to convince the jury that because the crime here was of a violent nature [second degree murder] then Milligan was thereby guilty." ***Id.*** at 209. Milligan was granted a new trial. ***Id.***

In ***State v. Taylor***, 739 S.W.2d 220, 223 (Mo. App. S.D. 1987), the defendant was convicted of manufacturing and possessing marijuana. The marijuana was seized from the defendant's and his girlfriend's home and surrounding property, after the girlfriend had given officers consent to search the property. ***Id***. at 221. The girlfriend's face and body exhibited evidence of having been assaulted. ***Id.***

During opening statement, defense counsel told the jury that the defendant had hit his girlfriend, which initiated a complaint against him for assaulting her, and was why the officers went to the trailer. ***Id***. at 222. The State, over the defendant's objections of relevance and undue prejudice, then elicited the details of the assault administered by the defendant to his girlfriend. ***Id.*** It was following this assault, that the girlfriend made her complaint to the officers. ***Id.*** After the State adduced this evidence, later defense counsel questioned the girlfriend about the alleged assault. ***Id.*** The girlfriend was called as a defense witness at trial, and admitted that the defendant had beat her up, and as a result, she made a complaint to the officers. ***Id***.

In ***Taylor***, the defendant asserted on appeal the trial court erred when it permitted the State to present evidence of the unrelated assault on the defendant's girlfriend. ***Id.*** at 221-22. The State claimed it was entitled to present evidence of the assault because it impeached the witness' testimony by showing bias and prior inconsistent statements. ***Id.*** at 223. The State's argued that since the defendant mentioned the assault during his

opening statement and presented evidence of the same during his case, any objection to evidence of the assault was waived. ***Id***. In reversing for a new trial, the appellate court rejected that argument and reversed for a new trial. ***Id***.

Here, the trial court agreed with defense counsel that this uncharged crime evidence was irrelevant and prejudicial; it had granted defense counsel's motion in limine and sustained the objection at trial. Nevertheless, without talking to the witness and admonishing him to stay away from this allegation, the prosecutor again elicited information about Nathan "messing with" Gossett's 16-year-old cousin. The trial court's admonition to the jury to disregard the last sentence Gossett made, was ineffective to remedy the prejudice, because the last statement Gossett made was "I don't know."

The admission of the bad character, other crimes evidence in this case violated Nathan's rights to due process, a fair trial and to be tried for the offense with which he is charged, as guaranteed by the 14th Amendment to the United States Constitution, and Article I, §§ 10, 17 and 18(a) of the Missouri Constitution. The evidence carried with it the significant risk that the jury might have given undue weight to the "if he did it once, he'll do it again" inference, which is the essence of propensity, or that the jury, in its rush to punish Nathan for his past acts, might have overlooked the fact that the State failed to prove him guilty of the charged offense. ***Batiste***, 264 S.W.3d at 650-51.

This Court cannot find that the admission of this improper evidence was harmless beyond a reasonable doubt. ***Watson***, 968 S.W.2d at 254. The record fails to demonstrate that Nathan was not injured by the error or that the jury disregarded or could not have been influenced by the evidence. ***Id***. Thus, this Court should reverse for a new trial.

III.

The trial court plainly erred in failing to declare a mistrial, *sua sponte*, after the trial court determined that the sidebar wherein the prosecutor mentioned that Nathan had "gangster tattoos all over him," could be heard by the jury, because this ruling violated Nathan's rights to due process of law and to be tried only for the offenses with which he was charged, guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Sections 10, 17 and 18(a) of the Missouri Constitution, in that this uncharged misconduct was not legally relevant to Nathan's guilt but was the type of information that could convince the jury that Nathan was a person of bad character who was more likely to commit the crime with which he was charged, and the jury had already heard additional uncharged misconduct through a previous witness, resulting in manifest injustice.

Facts and Preservation

At a sidebar during Jorgensen's testimony, Prosecutor Wall said that he intended to ask Jorgensen if Nathan acted or portrayed himself as a "gangster" (TR 313). Wall said that "he's got gangster tattoos all over him." (TR 313). The Court agreed with defense counsel that this is bad character evidence, which cannot come in unless Nathan testifies (TR 313). Later, co-defense counsel told the court that he stayed at counsel table during that sidebar to see if he could hear what was being said (TR 341). Counsel said that it was "loud and clear" to the jury that Prosecutor Wall had mentioned that Nathan had "gang tattoos" and jurors were taking notes at the time (TR 341). Defense counsel

requested to voir dire the jury to see if they had heard anything (TR 341). The trial court agreed that comments at the bench had "been loud enough that the jury on occasion could hear, and it worried me." (TR 342). The court also noted that "we just don't have a good alternative place for a sidebar, unless we send them out every time," and it asked the attorneys to be more conscious of whispering and being quiet (TR 342). The Court admonished the jury that none of the conferences at the bench are evidence and they are to disregard anything they overhear (TR 343-344). Defense counsel did not ask for a mistrial at that time, but raised the failure to grant a mistrial as error in Nathan's motion for new trial.

Standard of Review

Normally, a trial court's determination regarding the declaration of a mistrial is reviewed under an abuse of discretion standard. ***State v. Revelle***, 809 S.W.2d 444, 447-448 (Mo. App. S.D. 1991). But because defense counsel did not request a mistrial until the motion for new trial, review is for plain error. ***Rule 30.20***. But even where, as here, the error was not properly preserved, courts have found that such intentional misconduct can constitute manifest injustice mandating reversal. ***State v. Hammonds***, 651 S.W.2d 537, 539 (Mo. App. E.D. 1983), *citing* ***State v. Williams***, 646 S.W.2d 107 (Mo. banc 1983).

Nathan asserts that this error is similar to review of plain error in closing argument where trial courts may intervene to correct manifest injustice when warranted. Indeed, "plain error occurs in closing argument only if the closing argument contains reckless assertions, unwarranted by proof and intended to arouse prejudice, which, therefore, may

be found to have caused a miscarriage of justice." ***Morgan Publ'ns, Inc. v. Squire Publishers, Inc***., 26 S.W.3d 164, 170 (Mo. App. W.D. 2000) (quotation omitted). For the Defendant to carry his burden of showing plain error he must prove that the prosecutor's statement had a decisive effect on the jury's verdict. The prosecutor's statement is decisive when there is a reasonable probability that the verdict would have been different had the error not been committed. ***State v. Wright***, 216 S.W.3d 196, 201 (Mo. App. S.D. 2007).

Inflammatory argument may become unconstitutional when it "so infect[s] the trial with unfairness as to make the resulting conviction a denial of due process." ***Donnelly v. DeChristoforo***, 416 U.S. 637, 643 (1974). A trial court must correct obvious misconduct, even *sua sponte*. ***State v. Roberts***, 838 S.W.2d 126, 131 (Mo. App. E.D. 1993). Improper arguments can inject such "poison and prejudice" into a case that relief under plain error is necessary." ***State v. Burnfin***, 771 S.W.2d 908, 912 (Mo. App. W.D. 1989). In fact, numerous decisions of the Missouri Courts of Appeal have granted plain error relief for improper closing argument. *See*, ***State v. Copher***, 581 S.W.2d 59 (Mo. App. S.D. 1979); ***State v. Stutts***, 723 S.W.2d 594 (Mo. App. W.D. 1987); ***State v. Luleff***, 729 S.W.2d 530 (Mo. App. E.D. 1987); ***Hammonds***, 651 S.W.2d 537; ***State v. Weiss***, 24 S.W.3d 198 (Mo. App. W.D. 2000); ***State v. Wessel***, 993 S.W.2d 573 (Mo. App. E.D. 1999).

Analysis

It is a fundamental concept of criminal law that an accused is entitled to a fair trial,

and it is the duty of the trial court to see that he gets one. ***State v. Tiedt***, 206 S.W.2d 524, 526 (Mo. banc 1947); Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution. Here, the trial court should have declared a mistrial or, at the very least, questioned the panel about what they heard when it was clear to the trial court that the sidebar discussions could be heard by the jury and that the sidebar in question involved uncharged bad character evidence of alleged gang affiliation that the trial court already had determined was prejudicial and inadmissible. Indeed, the logical relevance of alleged evidence that defendant was a member of gang was far outweighed by its prejudicial effect, and therefore such evidence was not legally relevant and should not have been admitted. ***State v. Driscoll***, 55 S.W.3d 350, 354 (Mo. banc 2001).

A mistrial is a drastic remedy to be implemented only with the greatest caution in extraordinary circumstances. ***State v. Yahne***, 943 S.W.2d 741, 748 (Mo. App. W.D. 1997) *citing* ***State v. Ianniello***, 671 S.W.2d 298, 300 (Mo. App. W.D. 1984). Trial courts have broad discretion in deciding whether such a remedy is appropriate. *Id.*

As fully discussed in Point II, the State cannot prosecute a defendant for any crime that he has not been officially charged. Generally, the State is prohibited from using evidence of uncharged crimes to show propensity of the defendant to commit such crimes. ***State v. Burns***, 978 S.W.2d 759, 760 (Mo. banc 1998). When evidence of uncharged crimes is improperly admitted, the effect is that of trying the defendant of crimes he has not been indicted of. *Id.* at 761. If the jury heard the prosecutor talking about Nathan having "gangster tattoos all over him," this was terrifically prejudicial, and

the trial court had already determined that sidebar conversations could be heard by the jury. Therefore, it should be presumed that the jury heard the prosecutor's inflammatory comments, and the trial court should have declared a mistrial. The prosecutor had already been admonished for injecting uncharged crime evidence into Nathan's trial through the testimony of Shon Gossett (Point II).

Manifest injustice will occur if this error is left uncorrected because there was substantial evidence that Nathan did not commit this murder and that whatever actions he took were under duress from Jorgensen, who ultimately attempted to murder him. However, injecting evidence of uncharged crimes into Nathan's trial, that had no logical relevance to any issue, served to paint Nathan in a less than favorable light for the jury, which was undeserved. There is too great a danger that Nathan's jury heard the prosecutor's unsubstantiated allegations that Nathan had gang affiliations, which would deter and distract them from fully evaluating his defense, and from weighing his culpability fairly. The trial court should have granted a mistrial, and this Court must reverse Nathan's convictions and remand for a new trial.

IV.

The trial court abused its discretion in overruling Nathan's motion for a mistrial when Marianne Stout, the victim's mother, screamed from the witness stand, "Oh my God!" and burst into tears and had a "very big reaction in front of the jury" when the prosecutor showed her a graphic split-screen picture of her son alive and dead, causing a recess in the proceedings, because this ruling violated Nathan's right to due process and a fair trial, guaranteed by the 6th & 14th Amendments to the United States Constitution and Article I, Sections 10 & 18(a) of the Missouri Constitution, in that this outburst occurred at the outset of the trial and was caused by the prosecutor's apparent failure to prepare Ms. Stout before showing her the picture on the witness stand, to purposefully evoke an emotional response from her, and it prevented the jury from listening to further evidence and deciding the case in an objective fashion.

Facts and Preservation

When Stout's mother testified as the second witness, the prosecutor showed her Exhibit #1B, a split screen of two photos: one of her son alive, and one of him dead, covered in blood (TR 200). Apparently, the prosecutor did not warn Ms. Stout in advance of the pictures, because when he showed it to her, she cried out "Oh, my God!" (TR 200). The trial court agreed that Ms. Stout burst into tears, had a very large reaction in front of the jury, and it was a "very painful event" for her to see the picture (TR 203). The prosecutor apologized and a recess was taken for Ms. Stout to regain her composure

(TR 200). The trial court denied defense counsel's request for a mistrial (TR 201-202). The issue was renewed in Nathan's motion for new trial (LF 106). ***Rule 29.11(d)***.

Standard of Review

A trial court's determination regarding the declaration of a mistrial is reviewed under an abuse of discretion standard. ***State v. Revelle***, 809 S.W.2d 444, 447-448 (Mo. App. S.D. 1991). A mistrial is a drastic remedy to be used only in the most extraordinary circumstances when there is a grievous error which cannot otherwise be remedied. ***State v. Perry***, 447 S.W.3d 749 (Mo. App. E.D. 2014).

Legal Analysis

Missouri courts have confronted claims involving the effect of outbursts during the course of trial and the potential prejudice created by emotional behavior. ***State v. Brooks***, 960 S.W.2d 479, 489-91 (Mo. banc 1997). It is without cavil that emotional outbursts are to be prevented insofar as possible. ***State v. Johnson***, 672 S.W.2d 160, 163 (Mo. App. E.D. 1984). All emotional outbursts should be prevented and if sufficiently or obviously inflammatory may so deprive a defendant of a fair trial as to require the granting of a new trial. ***State v. Swindell***, 271 S.W.2d 533, 536 (Mo. 1954).

In ***State v. Connor***, 252 S.W. 713, 722 (Mo. 1923), as counsel was arguing to the jury that the victim would never be able to go home to his father, mother or sister, he dramatically turned to the victim's father and mother while the mother was weeping and sobbing and the father was fanning her. Objections by appellant's counsel were unavailing. ***Id.*** This Court reversed and remanded for a new trial, determining that the

defendant had not received a fair trial before a fair and impartial jury. "If the parents of the deceased could not restrain their emotions, the court on its own motion should have had them removed from the presence and hearing of the jury. Their griefs should not have been paraded before the jury" *Id.* In reprimanding the prosecutor for provoking such emotion in the victim's parents, it determined that his stage performance would more befit a theater than a court of justice. *Id.* "The perfervid appeals of counsel and dramatic allusions to the bereaved and grief-stricken parents evinced a studied purpose to inflame the prejudices and passions of the jury against the defendant." *Id.*

Where outbursts occur, the trial court may exercise broad discretion in minimizing or eliminating the prejudicial impact of a hysterical witness or gallery member. ***Brooks***, 960 S.W.2d at 491. In determining whether to declare a mistrial, the trial court may consider the spontaneity of the outburst, whether the prosecution was at fault, whether something similar, or even worse, could occur on retrial, and the further conduct of the trial. *See* ***State v. Hamilton***, 791 S.W.2d 789, 795 (Mo. App. E.D. 1990); ***State v. Johnson***, 672 S.W.2d at 163.

As defense counsel argued at trial, the prosecutor showed Ms. Stout the pictures to evoke an inflammatory response, which tainted the jury (TR 201). Exhibit 1B was a photo collage, designed by the prosecutor to juxtapose the victim alive and dead. While the alleged purpose of the photos was for identification, because the victim was wearing the same t-shirt in each photo, the identity of the victim was not in question. The defense never argued, nor could it argue, that the victim was anyone other than Kenny Stout. Jorgenson himself testified about who the victim was, and Nathan stated the identity of

the victim to law enforcement. Ostensibly, the prosecutor had called Ms. Stout to testify as to the events at Chris Jorgensen's house when they went looking for their son, which was a valid purpose. However, at the end of this legitimate testimony, the prosecutor shocked Ms. Stout by having her look at the bloody body of her dead son, without any prior warning. The response that the prosecutor received was the one he intended, and should have expected.[16] Such theatrics have no place in a courtroom.

This Court should also consider the totality of the prosecutor's misconduct during the course of Nathan's trial. Not only did he purposefully evoke an inflammatory response from the victim's mother, he elicited uncharged crimes evidence during Shon Gossett's testimony (Point II) and spoke loudly about Nathan having "gangster tattoos all over him" at the sidebar where the jury could hear him (Point III). The prosecutor is wholly to blame for the resulting prejudice to Nathan's right to a fair trial by an impartial jury, and this Court must reverse.

[16] Indeed, the emotions and hostilities of the Stout family towards Nathan were very obvious from the record. The victim's father, Mike Stout, assaulted Nathan by punching him in the face on the day that they came to Jorgensen's house (TR 214, 357). Further, at sentencing, Mr. Stout charged towards Nathan, screaming profanities and threats to kill him (Sent. TR 15).

CONCLUSION

Because the trial court erred in refusing to instruct the jury on involuntary manslaughter (Point I), and because the trial court should have declared a mistrial when the prosecutor: continued to elicit uncharged crimes that had been excluded (Point II), argued for the admission of other uncharged crimes evidence loudly at the sidebar conferences where the jury could hear (Point III), and elicited an emotional outburst by the victim's unprepared mother by shocking her with gruesome photos of her dead son (Point IV), this Court must reverse for a new trial.

Respectfully submitted,

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Certificate of Compliance and Service

I, Amy M. Bartholow, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Times New Roman, size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains **15,167** words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 23rd day of May, 2016, electronic copies of Appellant's Substitute Brief and Appellant's Substitute Brief Appendix were placed for delivery through the Missouri e-Filing System to Shaun Mackelprang, Assistant Attorney General, at Shaun.Mackelprang@ago.mo.gov.

/s/ Amy M. Bartholow

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